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Ombudsman



National Defence and Canadian Forces
Défense nationale et Forces canadiennes

THE WAY FORWARD

*Action Plan
for the
Office of the
Ombudsman*

André Marin

Ombudsman
January 1999



Ombudsman

André Marin

January 20, 1999

The Honourable Art Eggleton, P.C., M.P.
Minister of National Defence
National Defence Headquarters
Mgen G.R. Pearkes Building
101 Colonel By Drive
Ottawa, Canada
K1A 0K2

Dear Minister:

I am pleased to submit, for your consideration, my report *The Way Forward - Action Plan for the Office of the Ombudsman*. This proposal is based on vast research into various Ombudsmen models, as well as extensive consultation with a cross-section of stakeholders, both inside and outside the Department of National Defence and the Canadian Forces.

In my opinion, the recommendations contained within provide the necessary tools for operating a neutral, independent and credible office that will contribute to positive change within the institution.

Sincerely,

André Marin
Ombudsman



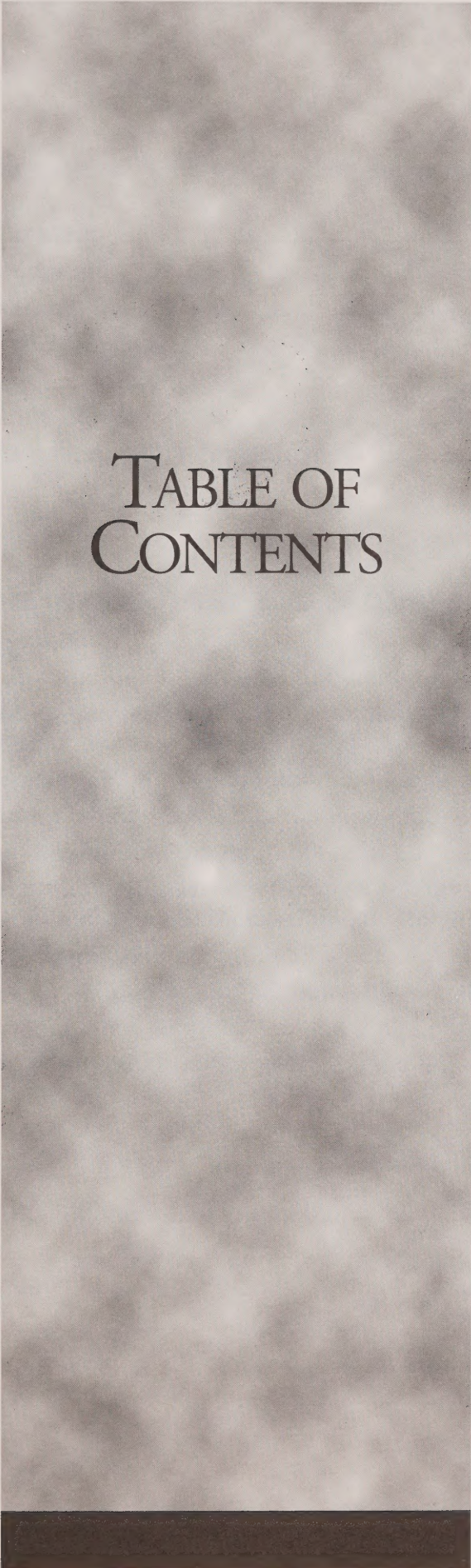


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INTRODUCTION

INTRODUCTION

The most significant challenge which faces the Office of the Ombudsman is to establish itself quickly as a credible organization capable of initiating positive change. To this end, after my appointment on June 9, 1998, I located in August 1998 an office outside of the Department of National Defence and Canadian Forces (DND/CF) and hired staff to assist me in developing and conducting a consultation. The consultation phase led to the preparation of this report.

The purpose of the consultation was threefold. First, it allowed my staff and myself to familiarize and educate ourselves about the workings of the DND/CF as we had no direct experience with the organization. Second, the consultation gave us an opportunity to present to the employees and members on the general concept of an Ombudsman. Third and most importantly, it allowed us to gather input and ideas for the successful operations of the Office. Whenever possible, we sought to identify if there existed any broader based consensus on some of the issues.

PUBLIC POLICY PARAMETERS

Although at the time of my appointment many issues that form the basis for recommendations in this report were left for me to consult on, you had nonetheless set several public policy parameters for the Office of the DND/CF Ombudsman. Some of them

were a source of contention¹ during the consultation process. Nonetheless, however forceful some participants were at times, in their objections to previously decided public policy issues, it was my position that such issues were beyond the scope of the consultation and were not going to be revisited.

REPORTING OF OMBUDSMAN

I report directly to the Minister of National Defence and am separate from the chain of command. I will be producing an Annual Report which will be made public.²

TERMS OF EMPLOYMENT

I have been appointed to a renewable term of three years “on good behaviour”.

CORE JURISDICTION AND MANDATE

Individual and systemic issues and injustices form part of the basic mandate of the Office.

CORE CONSTITUENCY

The Ombudsman will provide services to “Regular Force members, Reserve Force members, former service members, and their spouses, parents, or other designated next of kin, as well as civilian employees”.³

¹ Several examples can be found in Volume I and II, *Input from the Consultation*: “I’m not supportive of the Ombudsman reporting to the Minister.” (*Meeting with Mr. Douglas Ruck, Q.C., Nova Scotia Ombudsman, October 28, 1998*). Many felt that true independence could not be achieved unless I reported to Parliament: “To keep an air of openness, uncensored reports should go to Parliament. Are the recommendations being screened? Ombudsman should report directly to Parliament.” (*Meeting with Junior NCMs, 8 Wing Trenton, September 8, 1998*). “Report jointly to the Legislature to get rid of the cloud which is hanging over DND/CF.” (*Meeting with Junior NCMs, 8 Wing Trenton, September 8, 1998*). How can you criticize the Minister if you are working for him?” (*Meeting with Junior Ranks, CFB Gagetown, October 29, 1998*). See, however, “[i]f the DND Ombudsman reported to Parliament he would be the only federal Ombudsman to do so. I feel he should be reporting to the MND.” (*Working Lunch with Wing Command and Wing Council, 8 Wing Trenton, September 8, 1998*). “Il est important que l’Ombudsman se rapporte à l’autorité la plus élevée, soit le Ministre.” (*Meeting with Dr. Patrick Robardet, Senior Legal Advisor, Bureau du Protecteur du Citoyen du Québec, December 3, 1998*).

² Patrick Robardet, *Setting Up An Ombudsman’s Office* (Basic Principles, Statutory Provisions, Organization and Practices). Paper presented at the National Integrity Symposium, Kiev, Ukraine, November 28-29, 1997. “Reporting should, in principle, be made at the highest level; this is required by the notion of maintaining the appearance of independence and the need to secure effectiveness by ensuring support from authorities empowered to direct and implement recommendations.”

³ See *Background Documentation*, June 9, 1998.

METHODOLOGY FOR THE CONSULTATION

The consultation plan was developed with a view to producing the broadest and most complete information base as possible in a short time period.⁴ In order to speed up the consultation phase without sacrificing its thoroughness, I created two consultation teams from the Office. I headed one team while Senior Policy Advisor Gareth Jones headed the other.

We met with over 15,000 individuals from the DND/CF between the months of August and December 1998 – civilians and military members from all three elements and of all ranks in various parts of the country and in Belgium, Israel, Germany and Bosnia. In the case of the Military, the meetings were conducted informally and generally scheduled according to members' rank in order to promote as free flowing and as candid an exchange of ideas as possible.⁵ Although this method was much more onerous to carry out, it was necessary in order to facilitate members free and unencumbered access to me and my staff. We also met with civilian personnel whenever feasible. The views expressed by the participants were noted and are presented to you along with the *Action Plan*.⁶ This record of the discussions allows you to review the input we received.

In addition to the visits to National Defence Headquarters, bases, formations, wings, units, stations, and schools, we also invited input by posting a letter on the Defence Information Network (DIN) and an insert in *Esprit de Corps*, a magazine which covers military issues.⁷ We also published a similar letter in the *Maple Leaf*, the official newspaper of the DND/CF.⁸

⁴ Appendix II - List of groups and individuals consulted during the period of August 1998 up to and including January 1999.

⁵ I appreciate that some participants may have been reluctant to be as candid as they might in an open forum, even with only their peer group present. For this reason, we encouraged all members to contact us directly. A large number of individuals did so.

⁶ See Volumes I and II, *Input from the Consultation*.

⁷ *Esprit de Corps* – Canadian Military Then and Now, Vol. 6, Issue 8, September 1998.

⁸ *Maple Leaf*, Vol. 1, No. 9, September 1998.

We also consulted with a variety of civilian and military Ombudsmen and Ombudsmen-like institutions.⁹ This allowed me to study and compare their respective terms of reference and their operational frameworks. Consequently, I was able to identify features that were most effective in the experiences of other similar types of oversight agencies and adapt those features to the specific needs of the DND/CF.¹⁰ I was also able to identify weaknesses that reduced the efficiency of Ombudsmen's offices.¹¹ In this same vein, I found particularly instructive the 1998 *Report of the Auditor General of Canada* in which is published the result of an audit regarding the Canadian Human Rights Commission (CHRC). There are some significant similarities between the operations of the CHRC and the DND/CF Ombudsman. Both are tasked with receiving complaints, conducting investigations and publicly reporting on their operations. Ultimately, the success of the CHRC depends, as it will in the case of the DND/CF Ombudsman, on the credibility it can establish with the government and the public.

The consultation also extended to past members of the DND/CF, as well as leading academics and jurists. We also met with, or spoke to, many individuals who contacted us requesting assistance, and received their views as to how our Office should operate.

⁹ Appendix II, Part 3 - List of Ombudsmen and Ombudsmen-like institutions consulted during the period of August 1998 up to and including December 1998. In September 1998, I attended the 1998 USOA Annual Conference held in Detroit, Michigan. In attendance were several hundred Ombudsmen and new representatives from all over the world – one being from as far away as Namibia. It was during the course of this Conference that I invited other Ombudsmen to submit ideas, suggestions and recommendations for the setting-up of my Office. Many did so.

¹⁰ Dean M. Gottehrer and Michael Hostina, *Essential Characteristics of a Classical Ombudsman*, 1998. "Some of the most effective Ombudsmen's offices are most effective because of their Independence and Impartiality, Credibility and Confidentiality."

¹¹ For example, the ability to offer a confidential service is essential to the efficiency of the office: "A lot of Ombudsmen keep records and have exemption to Access to Information – a must. Record keeping lends itself to credibility." (Ms. Suzanne Belson, Ombudsman Concordia University, August 19, 1998). "I am ATI'able – it's killing what I'm doing. I need my files protected but it's not possible [...] so I record very little. I do not take notes." (Ms. Chantal Paradis-Chartier – Ombudsman for the Department of Indian and Northern Affairs, September 23, 1998). - For further discussion on this particular issue, see Chapter 3 sub-heading on "Confidentiality" at page 96 of this Report. Investigative powers are another cornerstone of an Ombudsman's work. For further discussion on Investigative Powers, see Chapter 4 at page 133 of this Report.

GENERAL APPROACH AND LAYOUT OF THE *ACTION PLAN*

Ombudsmanry must be viewed as a fluid concept capable of adapting itself to the specific and particular needs of the institution it is intended to serve. The content and layout of the *Action Plan* reflects this reality. The issues addressed in the *Action Plan* should be familiar to those in the DND/CF who have worked on the Ombudsman Project as long ago as the early 1990's. Indeed, upon my appointment, I was presented with a table entitled "*DND/CF Complaint Resolution Mechanisms*" which I have appended to the *Action Plan*. It lists some of the outstanding issues as "scope of mandate, inter-relationships, investigative authority, degree of independence (housing, funding, staffing) modality and frequency of reporting, privacy and access considerations, staffing process (remainder of staff) [...]".¹² All of which are addressed in the *Action Plan*.

An Ombudsman's role is to provide an ongoing opportunity to address complaints and concerns, and to foster change where any injustice and unfairness exist. An Ombudsman's role is to work with existing mechanisms in an impartial and independent manner. In the case of the DND/CF, additional channels of remedy will soon be coming into effect with the passage of Bill C-25 into legislation. The *Action Plan* not only respects the existence and role of available avenues but reinforces them by allowing every reasonable opportunity to the DND/CF to resolve its own issues before the Office of the Ombudsman formally intervenes. Even when I find that the complaint is justified, under the proposed regime, the DND/CF is given additional opportunities to cure the deficiency before a recommendation is forwarded to you.

Also embodied in the *Action Plan* is the traditional conciliatory approach of Ombudsmen as opposed to one based on an adversarial process. Furthermore, the *Action Plan* reflects the fact that the credibility of the Ombudsman is often directly proportional to the credibility of the review and investigative process he or she employs.

¹² Appendix III.

Finally, transparency, openness and accountability in the process have all been included in the model I am proposing to you. I view these concepts as essential to building the credibility we require as an oversight body.

As you are aware, one of the roles attributed to Ombudsmen is to serve as a “barometer” or a “reporter”, by bringing to the open, concerns and issues affecting people within the organization and proposing viable and reasonable solutions. In many ways, the *Action Plan* consists of my very first formal act of “barometering” or “reporting”, by relaying to you the concerns and issues raised by, amongst others, members of the DND/CF, in the future operations of my Office along with my recommendations to address them.

1

CHAPTER ONE

EVOLUTION OF THE OFFICE OF THE DND/CF OMBUDSMAN

FROM CONCEPT TO REALITY

On June 9, 1998, I was mandated with the task of setting up an Ombudsman's Office for the DND/CF. The Ombudsman position was in fact established and subsequently characterized as a "pioneering position" mandated to affect positive change.¹³ While it is true that my appointment came in the wake of several highly publicized reports on sexual harassment and assaults in the military, it is important to note that the concept of an independent oversight agency for the DND/CF had in fact been in constant evolution for several years.¹⁴ Key landmarks are essential in understanding the road that has led to the need for and the creation of the DND/CF Ombudsman's Office.

SOMALIA – 1993

The impact and consequences of the events surrounding the deployment of troops to Somalia in 1993 are too many to recount. The impetus for increased transparency, openness and accountability in the overall administration of the DND/CF has come from valuable lessons from the Somalia mission.¹⁵ Some of the issues brought to light included:

¹³ *Maclean's*, December 14, 1998 at page 22.

¹⁴ This impression has been voiced on many occasions during our consultation process: "Sir, are you here in response to the *Maclean's* feature on sexual harassment in the Canadian Forces?" (HMCS ALGONQUIN Mess, September 1998, Victoria).

¹⁵ D.J. Bercuson, Ph.D., FRSC, *A Paper prepared for the Minister of National Defence*, University of Calgary, March 25, 1997. "On a broader level, the CF, and particularly the Army, appears to be suffering from some of the symptoms of a breakdown in discipline, though this is far from uniform across regiments and units. In a sense, the CF is in a phase comparable to that which troubled the United States military during and after the Vietnam debacle. The most telling feature of the incidents involving the Canadian Airborne Regiment at Petawawa and in Somalia were that neither officers nor senior NCMs called a halt to destructive, murderous

- ◆ systemic and institutional deficiencies at headquarters and in theatre operations;
- ◆ lack or absence of leadership responsibility and accountability;¹⁶
- ◆ inadequate practices and real or perceived double-standards for junior and senior ranking members in the application of rules.¹⁷

While the Somalia Commission Inquiry was well underway, widespread low morale prevailed among Canadian Forces members. Considerable restructuring and massive downsizing initiatives undertaken by the DND/CF contributed to members feeling aggrieved.¹⁸ Morale continued to decline:

- We are bound by limited resources and cutbacks. Morale is low for our civilian employees – basically they have no job security. (*Meeting with a Senior Officer, CFB Esquimalt, August 31, 1998*)
- Problems are coming/stemming from lack of human/financial resources. Everything is frozen. It is hard, very discouraging, morale is low. (*Meeting at HMCS ALGONQUIN, September 1, 1998*)
- The existing small number of survivors of the cuts are shell-shocked by the workload. (*Meeting with Senior Officers - MARPAC, Victoria, August 31, 1998*)
- We lost fifty percent of civilian staff in this office in the past three years. All the stresses related to this attrition – survivors of these cuts wonder what will happen next and if they will still have a job in a week, a month, two months, etc. The institution is not taking care of these survivors. The turmoil has been tremendous due to cutbacks. (*Meeting with Senior Officers, Ottawa, August 13, 1998*)

events; indeed, some officers appeared to lead them. This suggests either fear of the NCMs, a stupid “boys will be boys” attitude, or a misplaced “macho” Ranger/Special Forces style that has no place in the CF; none of these is acceptable and all suggest an army turning inward on itself.” “[*Le Département de la Défense Nationale et les Forces canadiennes font*] un peu comme les Américains ont fait le ménage après le massacre au Vietnam.” (*Meeting with The Honourable Mr. Justice Gilles Lévesque, Ottawa, September 30, 1998 at page 1*). “USA had post-Vietnam; DND is having post-Somalia”. (*Meeting in Wainwright, September 3, 1998*).

¹⁶ Desmond Morton, *A paper Prepared for the Minister of National Defence*, McGill Institute for the Study of Canada, March 1997. “If the Canadian Forces in 1997 are in a crisis, it was not because of politicians or “pacifists”, journalists, or “whistle-blowers”. Those who leaked ugly secrets to the press gained nothing but the risk of exposure and expulsion an organization most of them wanted to save. It was a mark of their frustration that they felt compelled to expose their superiors to regain pride in a disciplined, effective military force.”

¹⁷ *Dishonoured Legacy: The Lessons of the Somalia Affair, Executive Summary*, Minister of Public Works and Government Services Canada 1997.

¹⁸ *VCDS Defence Planning Guidance 1997: Strategic Direction*. “The Department has undergone significant personnel reductions over the past three years in response to the 1994 White Paper directions. It is estimated that by March 31, 1999, the Regular Force will have known an overall reduction of approximately 32 percent since 1989. By April 1999, the Reserve and the civilian employees will have also experienced an overall reduction of approximately 45 percent since 1989.”

- [...] Our system is supposed to work but with downsizing and cuts it's hard. The majority of issues are due to lack of funds. (*Meeting with 1 AMS Group, 4 Wing Cold Lake, September 15, 1998*)
- With all the cutbacks, most of us are now doing four or five jobs. The work is piling up and there are no pay increases or advancements in [our] trade, no additional money. (*Meeting with Senior NCOs, CFB Gander, October 6, 1998*)
- *Ils ont perdu confiance dans l'organisme. On a rationalisé beaucoup. Ils ont peur de perdre leur travail. On a créé un sentiment d'insécurité.* (*Meeting with Senior Officer, CFB Valcartier, October 27, 1998*)
- We are doing more with less – stress, personnel resource cuts result in burn out, we have less support staff and working more hours. (*Meeting with Senior Officer, 1 Area Support Group – Edmonton, September 2, 1998*)
- *Les gens ont perdu confiance dans la chaîne de commandement, sa restructuration administrative a créé beaucoup de tension. On a peut-être fait les choses trop vite, cela a créé un choc. Nos gens n'ont pas eu d'avis préalable des compressions budgétaires. C'est arrivé du jour au lendemain – l'attrition, les coupures. Voilà d'où vient la crise actuelle.* (*Meeting with Senior Officer, CFB Valcartier, October 27, 1998*)
- It's affecting people so much they're close to suicide – five people with families are losing their jobs. (*Meeting with Civilian Union Representatives, CFB Gagetown, October 30, 1998*)
- I've never picked up a paper and read about the hard times we civilians are having, the focus is only on the military – we work right under their thumb and they ignore us [...] if they think that the CF is not being treated fairly, tell [the Minister of National Defence] to take a look at the civilians. (*Meeting with Civilian Union Representatives, CFB Gagetown, October 30, 1998*)
- It is a crime what [the government] is putting the military and civilians through – do more for less – cutting back, just dumping on us. (*Meeting with Civilian Union Representatives, CFB Gagetown, October 30, 1998*)
- An individual got up and as he was leaving stated: I've got a job I'm trying to keep and this is not helping me keep it. (*Meeting with Civilian Union Representatives, CFB Gagetown, October 30, 1998*)
- We are more than disillusioned, we're disgusted, we're tired, we're fed up – you'll have to forgive us for our negativity. (*Meeting with Civilian Union Representatives, CFB Gagetown, October 30, 1998*)
- *Par rapport aux ressources, on tire la couverture de partout, de chaque coin et on arrive difficilement. Ça va briser à quelque part, à un moment donné si ce n'est déjà arrivé. Ça fait mal à ce moment-ci. C'est rendu à ce point là.* (*Rencontre avec les officiers et sous-officiers supérieurs, Cours de formation professionnelle, St. Jean, le 7 décembre 1998*)

Exacerbating declining morale, occurrences of the past indicated that members no longer had the same level of confidence in the chain of command's commitment and ability to deal with complaints and grievances in a timely, fair and equitable fashion.

REPORT ON THE STUDY OF MECHANISMS OF VOICE/
COMPLAINT RESOLUTION IN THE CANADIAN FORCES -
THE DOSHEN PAPER #1 – NOVEMBER 1995

Brig.-Gen. (ret'd) Larry T. Doshen was retained by the DND/CF to study the issue and recommend alternatives to the existing "mechanisms of voice" at that time already available to CF members.¹⁹ By November 1995, the *Doshen Paper #1* had been completed and enunciated a series of six conceptual public policy options along the following lines:

- ◆ Amendments to the existing redress of grievance procedures;
- ◆ Creation of an external review agency;
- ◆ Creation of a military union or association;
- ◆ Creation of an Inspector General system;
- ◆ Creation of a classical Ombudsman Office; or
- ◆ Creation of an Organizational Ombudsman Office.

Brig.-Gen. (ret'd) Doshen concluded that "a classical Ombudsman would be the most effective mechanism of complaint resolution but is probably prohibitively expensive".²⁰ With respect to the six conceptual options above, the *Doshen Paper #1* recommended that the redress of grievance process be streamlined in order to provide more timely resolution of complaints.²¹ It also concluded that while an external review agency could have some "perceptual benefit" at some cost, it would not contribute greatly to the resolution of

¹⁹ Larry T. Doshen, *Report on the Study of Mechanisms of Voice/Complaint Resolution in the Canadian Forces*, November 30, 1995 (hereinafter, "The Doshen Paper #1").

²⁰ *Ibid.*, Executive Summary at page ii.

²¹ It was in further response to the then Minister's Report of 1997, the Reports from the Special Advisory Group on Military Justice and Military Police Investigation Services and the Somalia Commission of Inquiry that amendments to the *National Defence Act*, R.S.C. 1985, c. N-5, were tabled in the House of Commons on December 4, 1997. The amendments would modernize the *National Defence Act* in general and in particular, its Code of Service Discipline (see: Parts IV to IX.I of the *Act*). Bill C-25 "as well as many other reforms underway, will strengthen our institution so we can better serve Canadians." (The Honourable Art Eggleton, P.C., M.P., Minister of National Defence, News Release Communiqué dated December 4, 1997). Bill C-25 did in fact receive Royal Assent in Parliament on December 10, 1998 (News Release Communiqué dated December 11, 1998).

members' complaints.²² The *Doshen Paper #1* indicated that a military union or association "was negatively viewed by almost all military personnel and would not likely be welcomed by CF members."²³ The paper further stated that despite the fact that both an Inspector General system and a so-called classical Ombudsman would "do the most to give members confidence that their grievances would be resolved justly, [...] there would be considerable, perhaps prohibitive cost in establishing such an office".²⁴ In the end, the *Doshen Paper #1* recommended the establishment of an Organizational Ombudsman, as opposed to a so-called "classical" Ombudsman solely on the basis of cost.²⁵ It should be noted, however, that the paper did not offer or present any figures as to projected costs of such an option nor any form of cost/benefit analysis with respect to the various above-mentioned public policy options.

PROPOSED IMPLEMENTATION PLAN -
ORGANIZATIONAL OMBUDSMAN
THE *DOSHEN PAPER #2* – JULY 1996

In early 1996, Brig.-Gen. (ret'd) L.T. Doshen was commissioned to do a follow-up report on his initial findings. In July 1996, he submitted a second paper – an implementation plan for the Office of an Organizational Ombudsman.²⁶ In the months that followed, however, increasing concerns over the viability of a military Ombudsman were voiced primarily by senior management within the DND/CF.²⁷ The thrust of these concerns was of potential interference with and intrusion on the chain of command and on the Divisional system by an independent oversight body, such as that of an Ombudsman's Office. The

²² The *Doshen Paper #1*, *supra*, note 19 at page 61.

²³ *Ibid.* at page 60.

²⁴ *Ibid.*

²⁵ *Ibid.* at page 62.

²⁶ Larry T. Doshen, *Canadian Forces Organizational Ombudsman Implementation Plan*, July 10, 1996, (hereinafter, the *Doshen Paper #2*).

²⁷ Organizational Ombudsman Implementation Plan *Briefing Notes* to Personnel Policy Board (PPB), dated October 9, 1996 at page 7: "As things now stand, MARCOM is firmly opposed to the Ombudsman concept and LFC does not support the mediation function. In particular, the Commander of MARCOM has great difficulty accepting that such a programme can be successful without having a detrimental effect on the chain of command and the Divisional System."

rationale fueling these concerns was that an Organizational Ombudsman would ultimately erode military authority and leadership.²⁸

ABANDONING OF THE OMBUDSMAN CONCEPT

The Armed Forces Council (AFC) is one of the highest advisory boards which, through the office of the CDS, “reviews matters of policy, major defence programme issues and major activities of the CF in order to provide the CDS with military advice”.²⁹ The AFC is chaired by the CDS. Members include the VCDS, the CMS, the CLS, the CAS, the ADM(Per), the DCDS and others. Subsequent to the *Doshen Papers #1* and *#2* and the increased concerns over the implementation of an Ombudsman’s office, the Armed Forces Council had decided, by January 1997, to “shelve the Ombudsman proposal”.³⁰

RECOMMENDATIONS OF THE SPECIAL ADVISORY GROUP ON MILITARY JUSTICE AND MILITARY POLICE INVESTIGATION SERVICES IN *THE DICKSON REPORT* – MARCH 1997

Other internal reviews of the DND/CF were simultaneously underway during this same time frame. In December 1996, the then Minister of National Defence Doug Young undertook a complete review of leadership and management in the CF, supported by a Special Advisory Group on Military Justice and Military Police Investigation Services, chaired by the late Right Honourable Brian Dickson.

By March 14, 1997, the Special Advisory Group had submitted its report to the then Minister of National Defence.³¹ It embodied thirty-five recommendations designed to improve the efficiency and independence of the military justice system and of the military

²⁸ *The Doshen Paper #2*, *supra*, note 26. See also: *Briefing Notes* to PPB, *ibid.* at page 7. “**Erosion of Military Authority and Leadership:** There is profound concern that the existence and operation of an Ombudsman as a complaint-resolution alternative to the chain of command will undermine military authority and leadership. From the very beginning of this project, this concern was recognized as a potential obstacle to accepting any departure from the status quo – and, regrettably, this hurdle has still not been successfully cleared.”

²⁹ Armed Forces Council Resolution, s. 5, article 1 at page 6-5-1.

³⁰ Karol W.J. Wenek, Internal Document provided to my Office dated January 14, 1997.

³¹ *Recommendations of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997. (hereinafter, “*The Dickson Report*”).

police. The notion of establishing an Ombudsman's office had regained a sense of legitimacy:

It is very important that CF members be given a voice, consistent with the appropriate authority of the chain of command, so that their concerns and complaints can be independently investigated and, if necessary, dealt with. For in the broadest sense, military justice must include an effective, independent channel or mechanism through which members can express their concerns about any aspect of the military establishment, without feeling their only outlet is the media. Such a mechanism would ultimately strengthen the chain of command. We wish to stress, that oversight and review requirements go far beyond the military justice system and the military police. They pertain to a myriad of individual issues in which CF people may feel the need to have a voice and be heard. [It was recommended] that an independent office of complaint and review system oversight, such as a **military Ombudsman, be established within the Canadian Forces, and that it report directly to the Minister of National Defence.**³² (Emphasis Added)

THE YOUNG REPORT – MARCH 1997

On March 25, 1997, the then Minister of National Defence submitted to the Prime Minister a series of twelve documents now commonly referred to as "*The Young Report*".³³ Specifically, in *Leadership and Management of the Canadian Forces*, the then Minister endorsed the Special Advisory Group's recommendation *in part* and directed the creation and full implementation of an Ombudsman's office. Contrary to the recommendation of the *Dickson Report*, it was recommended by the then Minister, Doug Young that the Ombudsman would report to the Chief of Defence Staff and to the Deputy Minister. The intended plan was to:

Set up an office of Ombudsman outside the chain of command under the authority of the Chief of the Defence Staff and the Deputy Minister before the end of the year. The Ombudsman will provide information, advice and guidance to all personnel, military or civilian, in need of help or who believe they have been treated improperly.³⁴

³² *Ibid.*, Recommendation #35 at pages 65-66.

³³ *Report to the Prime Minister*, March 1997 (hereinafter, "*The Young Report*").

³⁴ *Ibid.*, Recommendation #8 at page 10.

DISHONoured LEGACY:

THE LESSONS OF THE SOMALIA AFFAIR – JUNE 1997

On June 30, 1997, the Commission of Inquiry into the Deployment of Canadian Forces to Somalia submitted its final report to the Government containing 160 recommendations.³⁵ *The Somalia Report* recommended, *inter alia*, that “the *National Defence Act* [...] be amended to establish an independent review body, the Office of the Inspector General, with well-defined and independent jurisdiction and comprehensive powers [...].”³⁶ The Inspector General, it was intended, would report to Parliament. The Somalia Commission of Inquiry stressed the need for renewed commitment to principles of Independence, Impartiality, Transparency, Objectivity and Protection from Retribution for all members of the institution:

[...] left uncorrected, the problems that surfaced in the desert in Somalia and in the boardrooms at National Defence Headquarters will continue to spawn military ignominy. The victim will be Canada and its international reputation.³⁷

In addition, the Somalia Commission of Inquiry requested that the Department of National Defence report to Parliament by no later than June 30, 1998, and that the Department be made accountable for the implementation of its recommendations.

A COMMITMENT TO CHANGE – OCTOBER 1997

By the fall of 1997, the Department of National Defence had had the opportunity to analyze the recommendations contained in the *Somalia Report* and various other reports, notably that of your predecessor, former Minister Doug Young.³⁸ You announced that your Department endorsed 132 of the 165 recommendations in the *Somalia Report*, “in whole or in part”, and that it had already implemented many of the proposed changes.³⁹ Recommendation 16.1 (COIR 16.1) had been accepted in part – that is, the establishment of

³⁵ *Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada, Ottawa, 1997 (hereinafter, “*The Somalia Report*”).

³⁶ *Ibid.*, COIR (Commission of Inquiry Recommendation) 16.1.

³⁷ *Ibid.* at page ES-1.

³⁸ *The Young Report*, *supra*, note 33.

³⁹ *A Commitment to Change: Report on the Recommendations of the Somalia Commission of Inquiry*, Minister of National Defence, Ottawa, October 1997.

an Inspector General had *not* been accepted, but a variety of initiatives had already been underway to achieve greater transparency and accountability within the Department and the Canadian Forces. Amongst the initiatives already underway came the commitment to a forthcoming appointment of an Ombudsman.

The concept of an independent Ombudsman, under your leadership, continued to evolve. The DND/CF Ombudsman would once again report directly to the Minister and operate independently of the chain of command:⁴⁰

This position was recommended by my predecessor, Doug Young, in a report to the Prime Minister a little over a year ago. I've taken the recommendation one step further in recommending that rather than reporting to the Chief of Defence Staff and to the Deputy Minister, **it [will] report to myself, report to the Minister.**⁴¹ (Emphasis added).

APPOINTMENT OF THE OMBUDSMAN – JUNE 1998

I was appointed as the first Ombudsman for the DND/CF on June 9, 1998, and took office on June 15, 1998, for a three-year term. I was then invited to develop and propose an operational framework, which would carry out the mandate and the vision of the Ombudsman's Office.

⁴⁰ *Ibid.*, Recommendation #8.

⁴¹ The Honourable Art Eggleton, P.C., M.P., Minister of National Defence, Transcript - *Introducing the DND/CF Ombudsman*, June 9, 1998, at page 1 of 10.

2

CHAPTER TWO

OMBUDSMEN MODELS

There are numerous types of Ombudsmen, with widely varying tasks and authorities. Although not an exact science, generally Ombudsmen are divided into two groups; classical and organizational, though there is constant evolution within each group, and the demarcation lines between each are changing rapidly. Further, there are several different species of Organizational Ombudsmen, such as military or specialty Ombudsmen. Many Organizational Ombudsmen are vested with considerable power, albeit they do not report to a legislative body. For our purposes, I have divided the models into two broad categories, civilian Ombudsmen and military Ombudsmen, and then into respective classical and organizational sub-categories.

CIVILIAN

CLASSICAL OMBUDSMEN

CONCEPT

The tradition of a person responsible for receiving complaints against the administrative actions of government, investigating them and recommending appropriate solutions if warranted is a long one, with its roots in Africa and Scandinavia. The idea has evolved into the concept of the classical Ombudsman.

According to materials published by The Ombudsmen's Association (TOA), a U.S.-based umbrella body for a proportion of Organizational Ombudsmen, classical Ombudsmen possess the following characteristics:

- ◆ function is created by law;
- ◆ appointed by legislative bodies;
- ◆ power to do formal investigations;
- ◆ subpoena power;
- ◆ strong legal safeguards for their independence and the confidentiality of records;
- ◆ publish public reports.⁴²

All Canadian provinces, with the exceptions of Newfoundland and Prince Edward Island, have a provincial Ombudsman. Several have been established for decades. They share the traditional characteristics of a classical Ombudsman's office, including legislated mandates, formal statutory powers and reporting procedures. Provincial Ombudsmen normally have jurisdiction to examine any aspect of governmental administration, with very few exceptions. They possess the power to recommend, but cannot mandate the implementation of any recommendations.

There is currently no federal government classical Ombudsman of general jurisdiction. The concept was examined in a 1977 study and report,⁴³ ordered by the then Prime Minister and conducted by a team of Deputy Ministers, which recommended the adoption of a classical type Ombudsman's office for the federal Government. It was recommended that the office also cover the Department of National Defence. The bill, which was subsequently introduced by the government, did not pass in Parliament before the session was dissolved.⁴⁴

⁴² The Ombudsman's Association (TOA), Ombudsman 101 Course material, Table 1.

⁴³ J.D. Love *et al.*, *Report of the Committee on the Concept of the Ombudsman*, Government of Canada, Ottawa 1977.

⁴⁴ *Ombudsman Act* Bill C-43 (April 5, 1978), 3rd Session, 30 Legislature, 26-27 Elizabeth II, 1977-1978.

There are, however, several federal government Ombudsmen-like offices, which have similar powers to provincial Ombudsmen, but have jurisdiction over relatively narrow fields.

ILLUSTRATIONS

AUDITOR GENERAL

The Auditor General of Canada is governed by the *Auditor General Act*, reports annually to the Speaker of the House of Commons, and can issue a special report on any pressing or urgent issue. He has a mandate to inquire into and report on any matter relating to the financial affairs of Canada or public property. He has extensive investigative powers, and may exercise all powers of a Commissioner under Part I of the *Inquiries Act*.

PRIVACY COMMISSIONER

The office of the Privacy Commissioner of Canada has a mandate to investigate complaints made under the *Privacy Act*. He has strong investigative powers, including the power to subpoena and hear evidence under oath. The Commissioner reports to the Speaker of the House of Commons.

INFORMATION COMMISSIONER

The office of the Information Commissioner of Canada has a mandate to investigate any complaint where it is alleged that government has denied rights under the *Access to Information Act*. He has virtually identical powers and reporting procedures as the Privacy Commissioner.

OFFICIAL LANGUAGES COMMISSIONER

The Official Languages Commissioner describes himself as Canada's language Ombudsman. He has a mandate to investigate complaints under the *Official Languages Act* and reports to the Speaker of the House of Commons. He has wide-ranging investigative powers and makes recommendations based on his findings.⁴⁵

⁴⁵ Commissioner of Official Languages, *Annual Report, 1996*.

ORGANIZATIONAL OMBUDSMEN

There are several types of Organizational Ombudsmen. Some are empowered, some are not.

UNEMPOWERED OMBUDSMEN

CONCEPT

The Ombudsman Association (TOA) Organizational Ombudsmen model is the model that is cited most often in internal DND/CF documents as a possible template for my Office.

TOA-style Organizational Ombudsmen have somewhat different features to those of classical Ombudsmen, as well as many other Organizational Ombudsmen. These features are as follows:

- ◆ employee of the organization;
- ◆ confidential;
- ◆ designated neutral;
- ◆ communications channel;
- ◆ complaint handler;
- ◆ dispute resolver;
- ◆ change maker.⁴⁶

Typical functions often, but not always, ascribed to a TOA-type Organizational Ombudsman's office include:

- ◆ listening/venting;
- ◆ providing information;
- ◆ reframing issues/developing options;
- ◆ referring;
- ◆ advice/coaching;
- ◆ looking into a problem;
- ◆ formal mediation;
- ◆ propose changes to policies and practices;
- ◆ monitoring and upward referral of trends.⁴⁷

⁴⁶ The Ombudsman Association, *supra*, note 42.

⁴⁷ These are the "10 points", quoted in TOA literature and in some of the material prepared by NDHQ during the set up phase of the Office.

These are the characteristics of the lowest level, “softest”⁴⁸ type of Ombudsmanry. They were published in a pamphlet entitled “*Options, Functions and Skills: What an Organizational Ombudsperson Might Want to Know*”,⁴⁹ by Dr. Mary Rowe, TOA co-founder and former president, and currently the Ombudsperson at the Massachusetts Institute of Technology (MIT).

TOA Ombudsmen are normally employees of corporations, or, in the US, of universities. Indeed, the TOA was originally called the Corporate Ombudsman Association. It changed its name to TOA in 1992. The essence of the TOA-style Organizational Ombudsmen approach is helping the complainant help him or herself come up with solutions to their work related problems. TOA Ombudsmen do not normally ascertain the facts relating to an issue, nor do they normally present formal recommendations to decision-makers. The approach is typified in a quote from the Ombudsperson at Harvard Medical School, speaking at a TOA training session in October 1998. She gave the scenario of a person who comes to her having just lost his or her job. Her approach was to listen, allow the person to vent, and offer options, but, at the end of the day, the person “just wanted a hug”.⁵⁰

Other TOA Ombudsmen were quite frank about one of the reasons they exist – to mitigate corporate liability. In the United States, corporate Ombudsmen are increasingly being promoted as an example of a corporations desire to do the right thing. This may go some way to reduce fines where corporations are found liable in court.⁵¹

⁴⁸ The Ombudsman Association, *supra*, note 42.

⁴⁹ Mary Rowe, Ph.D., *Options, Functions and Skills: What an Organizational Ombudsperson Might Want to Know*, A publication of The Ombudsman Association, Dallas, Texas, 1995.

⁵⁰ Presentation at The Ombudsman Association (TOA) Ombudsman’s 101 Course, October 21 to 23, 1998.

⁵¹ *TOA Ombudsman Handbook*, Chapter 4-4.

ILLUSTRATIONS

PRIVATE SECTOR

The Toronto Dominion Bank “Between Us” model

The Toronto Dominion (TD) Bank "Between Us" programme, is the specific one occasionally cited in internal DND/CF materials as a template for my Office.⁵² The programme began in 1977 and has a mandate to informally resolve internal work-related complaints from members of staff. It attempts to do so by low level negotiation, coaching, education and assisting the complainant to develop options. It does not have any formal or even informal powers. Roughly half its calls are requests for information or interpretation of policies. All calls are treated confidentially, and staff members do everything they can to protect the identity of the complainant. All notes are shredded after three months. The staff is comprised of four employees and a mid-level manager who reports to a Senior Vice President of Human Resources, usually once every month. The “Between Us” office does not investigate complaints, nor does it attempt to establish any of the facts of a particular case. It dispenses advice, shreds any documents taken during meetings, and has no formal follow up procedures, resulting in a self-acknowledged difficulty measuring its effectiveness.⁵³

Bank of Nova Scotia Ombudsman

The Bank of Nova Scotia has four Ombudsmen who work mainly from their homes and deal with internal work-related issues. They do not keep records and any case notes are shredded once a case is concluded. They do not meet with people who call them. They do not investigate or mediate. The Bank of Nova Scotia Human Resources Manual advises employees that the Ombudsman's office can: listen, provide information, identify options, help you to help yourself, refer you to the right person and obtain information for you.⁵⁴ They accept anonymous calls and, in fact, have no way of knowing if callers are even

⁵²For example, see the *Doshen Paper # 1*, *supra*, note 19. The TD Bank “Between Us” programme was the **only** example of an organizational Ombudsman discussed in the *Doshen Paper #1*.

⁵³ Meeting with "Between Us" representatives, August 14, 1998.

employed by the bank. They have no formal powers. Typical problems they deal with include performance appraisal disputes, employee - manager disputes and disagreements over short and long term sickness entitlements.⁵⁵

Hydro Québec Ombudsman

The Hydro Québec Ombudsman describes herself as “a corporate Ombudsman”. She reports to the Chair of the Board of Directors but has no formal powers. She agrees that credibility is the cornerstone of a successful Ombudsman’s office. She does not keep records and has no formal tools to measure the success of her office. Recently, she retained outside counsel who were successful in enabling her to avoid being compelled to give evidence in court concerning a matter she had dealt with.

PUBLIC SECTOR

Department of Foreign Affairs and International Trade Ombudsman

We met with the Organizational Ombudsman at the Department of Foreign Affairs and International Trade (DFAIT).

DFAIT has had an Ombudsman in place since the early 1990’s. The incumbent works alone and receives about two hundred calls per year, of which “ten percent are serious”. She states she destroys all her notes because she is subject to the *Access to Information Act* and wishes to do her utmost to protect confidentiality. She advises this is not conducive to her ability to do her job. She has no formal powers. In an interview, she pointed out that the DND/CF Ombudsman would need to be “muscular”, which she defined as having the ability to go to people to get answers and co-operation, and “should have more authority than the average Ombudsman”. She saw a clear distinction between the model she worked under to that she envisioned being effective for the DND/CF, which she described as “a totally different animal”. She also advised that “it is important you have teeth.”⁵⁶

⁵⁴ Bank of Nova Scotia, The Staff Ombuds Office: *Human Resources Policies*, s. 5.2.

⁵⁵ Meeting with Bank of Nova Scotia Ombudsman at TOA 101 Course, October 26, 1998, and a telephone interview by a member of my staff, January 6, 1999.

⁵⁶ Meeting with Ms. Isabelle Massip, DFAIT Ombudsman, August 18, 1998.

Department of Indian Affairs and Northern Development

We also met with the Ombudsman at the Department of Indian Affairs and Northern Development (DIAND). She reports directly to the Deputy Minister. She has no investigative powers and “does not participate in a fact-finding exercise” in any of the two hundred or so cases she deals with each year. She concentrates on mediation at an early stage, adopting non-threatening, non-confrontational approaches. She does not write reports, nor does she keep records.

Canadian International Development Agency

The Canadian International Development Agency (CIDA) conducted a 15-month TOA-type Organizational Ombudsman pilot project, that ended in May 1998. The office received 59 “contacts” during the course of the project.⁵⁷ As a result of an employee survey, CIDA decided to set up a permanent Ombudsman’s office, which will re-open in January 1999. The CIDA office will be similarly structured to those of DFAIT and DIAND. The Ombudsman will concentrate on mediation, and not keep files nor take notes.

EMPOWERED ORGANIZATIONAL OMBUDSMEN*CONCEPT*

Over the last few years a schism has developed between TOA-style Organizational Ombudsmen and a wide variety of Organizational Ombudsmen from various fields who feel that they need investigative powers to do their job properly.⁵⁸ They have been created to meet the specific needs of the organization, and their terms of reference and powers are tailored to that end. They also serve the function of acting as an alternative to traditional litigation. These modes are not “classical” Ombudsmen as defined above by the TOA. They are not set up by legislation, nor do they enjoy strong legal safeguards guaranteeing their autonomy. They do not report to a legislative body. They come from the educational, media and, increasingly, the corporate fields. They report directly to the organization that employs them, attempt to resolve issues informally if possible, but have the capacity to investigate and

⁵⁷ Meeting with Mr. J.P. Bolduc, CIDA Ombudsman, December 7, 1998.

⁵⁸ In fact, some TOA-style Ombudsmen describe themselves as “facilitators”, “work problems counsellors”, “listeners”, “ombuddy”, or in similar terms, rather than “Ombudsmen” *per se*. Others describe people who complain to them as “visitors”, “clients”, “inquirers”, or simply “people in contact with the office”.

make recommendations if necessary. They are vested with considerable power and authority, and there is clearly a correlation between their ability to ascertain the facts and their credibility within their fields.⁵⁹ We studied several such empowered models, including several from the private sector.

ILLUSTRATIONS

Concordia University Ombudsman

The Concordia University Ombudsman has held this position for twenty years. She has the power to investigate and make recommendations directly to the Rector of the University. She deals with systemic and individual issues. She states that while she does not often use her investigative powers, the fact they exist are essential in establishing her credibility and in resolving issues. She resolves the vast majority of her cases by mediation and negotiation, but there are a percentage of cases where she states, “[...] there is no substitute for an investigation.” She has well defined terms of reference that give her the authority to:

Conduct an independent and objective inquiry into complaints where normal channels of recourse have been exhausted.⁶⁰

She also enjoys strong investigative powers. Her terms of reference include the provision that she has:

Immediate access to such University records, reports or documents as are required to fulfil (her) functions. Requests for such access shall receive priority from all members.⁶¹

She does not differentiate between formal and informal investigations, and has no formal limits on her ability to intervene.⁶² She is of the opinion that the authority to investigate is an essential pre-requisite of any person using the name Ombudsman.

⁵⁹ Several were at the 1998 TOA Ombudsman 101 Course, including representatives from the Los Angeles Police Department and the Nuclear Safety Concerns office of the Southern California Edison Company.

⁶⁰ Concordia University, *Terms of Reference* for the Ombuds Office.

⁶¹ *Ibid.*

⁶² Other than issues involving the interpretation or application of a collective agreement.

Canadian Broadcasting Corporation Ombudsman

The Canadian Broadcasting Corporation (CBC) Ombudsman is another example of an empowered Organizational Ombudsman.⁶³ He thoroughly investigates complaints about programmes from both public and internal sources, but does not begin his investigation until all other avenues are exhausted. He reports directly to the CBC President and Board of Directors. He has unlimited latitude to independently investigate issues that have not been resolved by other means, and sees this ability as fundamental to his effectiveness and credibility. In an interview with a member of my staff, he advised that:

The power of the Ombudsman is directly related to the credibility of his findings. The investigations must be able to withstand scrutiny from all stakeholders. They must be painstaking and detailed. They cannot be flawed or incomplete. You couldn't do this work without an investigative capacity.⁶⁴

Mr. Bazay advises that to do his job he requires, and receives, complete access to people and documents within the CBC. He has the capacity to self-initiate investigations and can, and does, retain outside experts to assist him in his investigations, particularly in instances where the investigation involves technical knowledge outside of his area of expertise. It is some indication of the outside credibility of his office that the Prime Minister's Office recently requested he investigate aspects of the CBC's coverage of the Asian Pacific Economic Conference (APEC) story.

Magna International Ombudsman

At Magna International, a large auto-parts manufacturer based in Ontario, three of the four Ombudsmen staff function as investigators, making recommendations to management on problem resolution.⁶⁵

Toronto Star Ombud

The Toronto Star Ombud, who reports directly to the Publisher of the newspaper, has access to all people and documents within the organization. He can launch investigations on

⁶³ CBC has two Ombudsmen, one for French and one for English language programming. We met with Mr. David Bazay, the English language Ombudsman and M. Marcel Pépin, the French language Ombudsman.

⁶⁴ Meeting with Mr. Bazay, CBC Ombudsman, September 9, 1998.

his own volition or as the result of a complaint from any person. He has the executive authority to direct the paper to publish a correction if he determines it justified.⁶⁶ He has a weekly column on the editorial page of the newspaper, in which he may deal with cases he has investigated.

Canadian Banking Ombudsman

The Canadian Banking Ombudsman deals with customer complaints that have not been resolved by member institutions. He reports to a board of six independent directors, but does not solicit their advice, nor report to them on specific complaints. The Ombudsman's decision is final. There is no appeal to the board, nor "can the board exert influence on the Ombudsman's recommendations."⁶⁷ He has the power to investigate any matter brought to him, and prides himself on the professionalism of his investigations. He notes that:

By design, the investigation of complaints is not a rigidly structured process. Some complaints are resolved in an informal way. In cases where the facts are clear, the customer and the bank may be brought together for a meeting to clarify the issues of the dispute and, hopefully, resolve the problem. Complaints in which there are differences of opinion over facts may require a detailed investigation.⁶⁸

Toronto Dominion Bank Ombudsman

In addition to the TD Bank "Between Us" programme, the TD bank does, in fact, have an Organizational Ombudsman, whose mandate is to deal with external complaints involving the bank and its customers. The TD Ombudsman reports directly to the President and Board of Directors and has the ability to investigate complaints and recommend solutions.⁶⁹

⁶⁵ David Nitkin, *Corporate Ombudsman Functions in Canada*, The Corporate Ethics Monitor, Vol. 10, Issue 5, September-October 1998 at page 77.

⁶⁶ Telephone interview with Mr. Don Sellars, Toronto Star Ombud, by a member of my staff, December 8, 1998.

⁶⁷ Canadian Banking Ombudsman, *Annual Report 1997* at page 10.

⁶⁸ *Ibid.*

⁶⁹ The Bank of Nova Scotia also has an Ombudsman who deals with customer issues. He has powers similar to the Toronto Dominion Bank Ombudsman.

Algonquin College Ombudsman

Even some relatively smaller scale organizations empower their Ombudsmen. For example, Algonquin College, a community college in Ottawa, has an Ombudsman who deals primarily with student issues. He conducts investigations, as indeed does almost every other academic Ombudsman in Canada.⁷⁰

Office of the Correctional Investigator

During my consultations, it was suggested that I examine the model used by the federal office of the Correctional Investigator. Like my Office, the Correctional Investigator's office is unique in that it operates as a specialty Ombudsman, over-seeing the activities of a specific government organization (Correctional Services Canada) and dealing with the problems of a particular group of persons within a unique context and culture; while reporting directly to a Minister.

The office of the Correctional Investigator was established on June 7, 1973, as an independent avenue of redress for inmate complaints. The Correctional Investigator was initially appointed as a Commissioner pursuant to Part II of the *Inquiries Act* with a mandate to investigate on her own initiative or on complaint from or on behalf of inmates and to report upon problems of inmates that came within the responsibility of the Solicitor General. The appointment of the investigator under the *Inquiries Act* allowed for an opportunity to accord formal powers to the Correctional Investigator, while at the same time allowing the government the opportunity to evaluate the effectiveness of the office before it became encased in legislation.⁷¹

The office was formally encased in legislation on November 1, 1992, with the enactment of the *Corrections and Conditional Release Act (CCRA)*.⁷² Although the *CCRA* did not significantly alter the authority or the role of the office, it did "clearly establish the

⁷⁰ Research notes supplied by the Association of Canadian College and University Ombudspersons (ACCUO) indicates that one of the primary functions of their members is "[...] to investigate complaints of unfair treatment in an impartial and objective manner". An informal survey of the mandates of these institutions, conducted by the ACCUO president, indicates that by far the most common power amongst the group was that of the ability to investigate issues brought to their attention.

⁷¹ *The Correctional Investigator: Overview of the Mandate and Operations* at page 1, presented at meeting with Mr. Ron Stewart, Correctional Investigator, December 16, 1998.

⁷² *Corrections and Conditional Release Act*, R.S.C. 1992, c. 20 (hereinafter, the *CCRA*).

function of the Correctional Investigator as that of an Ombudsman and clarify the authority and responsibility of the office within a well defined legislative framework”.⁷³

The provisions of Part III of the *CCRA*, which establish the operating framework for the Correctional Investigator’s office, parallel very closely those of Provincial Ombudsman statutes.⁷⁴ Although the Correctional Investigator has all of the powers of a “classical” Ombudsman, he is not “classical” in the true sense of the word, as he does not report directly to the House of Commons. The Correctional Investigator reports directly to the Solicitor General. His budget is set by the Solicitor General and not independently through Treasury Board. The annual and special reports of the Correctional Investigator must however be presented to Parliament by the Solicitor General on any of the first 30 days after it is received and on which the House is sitting.⁷⁵

The fact that the Correctional Investigator does not report directly to Parliament but must go through the Solicitor General, who has the responsibility for Corrections, has been a source of much debate and contention. During the public consultations leading up to the finalization of the *CCRA* many parties, including the office itself, advocated for a direct reporting to Parliament.⁷⁶

Under the *CCRA*, the Correctional Investigator is appointed for a term of five years, subject to “good behaviour”. The mandate of the Correctional Investigator is detailed in section 167(1) of the *CCRA* which reads:

To conduct investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner (of Corrections) or any person under the control and management of, or performing services for or on behalf of, the Commissioner, that affect offenders either individually or as a group.⁷⁷

The office receives about 6,500 complaints during the course of a year and staff spend approximately 350 days in federal penitentiaries and can conduct in excess of 2,000

⁷³ *Ibid.*

⁷⁴ *Ibid.* at page 2.

⁷⁵ *Correctional and Conditional Release Act, supra*, note 72, s. 192 and s. 193.

⁷⁶ *The Correctional Investigator: Overview of Mandate and Operations, supra*, note 71 at page 1.

⁷⁷ *Correctional and Conditional Release Act, supra*, note 72, s. 167(1).

interviews with inmates and about 1,000 interviews with institutional and regional staff.⁷⁸ The Correctional Investigator has full discretion as to whether an investigation should be conducted, how it is to be carried out and whether an investigation should be terminated. In practice, the office recommends to inmates that they try to resolve problems through internal redress processes first but this is not a precondition to their involvement. The Correctional Investigator may exercise his discretion to become involved at the first instance if it is determined that the offender will not or can not reasonably address the area of complaint through the internal redress process or the area of complaint is already under review with the Correctional Service.⁷⁹

Under the *CCRA*, the Correctional Investigator has broad powers of investigation including:

- ◆ considerable authority to access information and documents;
- ◆ the right to enter government premises for inspections or inquiries; and
- ◆ the right to hold hearings under oath.⁸⁰

Recourse to the use of formal powers, however, is not always necessary and the office tries to focus on addressing problems at the level of the complainant and the staff through discussion and negotiation.⁸¹

The Correctional Investigator's office has also had the unique opportunity and benefit of an outside review of the office's effectiveness, as part of the recent legislative five-year review to the *CCRA*.⁸² Many of those consulted as part of this review felt that the office is understaffed and under-funded and that staff are located far from the institutions and are only able to get to each institution infrequently. It was recommended, as part of this review, that the office be given greater resources. The report also noted that some offenders argued that

⁷⁸ *The Correctional Investigator: Overview of Mandate and Operations*, *supra*, note 71 at pages 7-8.

⁷⁹ *Ibid.* at page 7 and confirmed during a meeting with Mr. Ron Stewart, Correctional Investigator December 16, 1998.

⁸⁰ *The Correctional Investigator: Overview of Mandate and Operations*, *supra*, note 71 at page 3. See also *Corrections and Conditional Release Act*, *supra*, note 72, s. 171 through to s. 174.

⁸¹ *Ibid.* at page 8 and confirmed during a meeting with Mr. Ron Stewart, Correctional Investigator December 16, 1998.

⁸² *Towards a Just, Peaceful and Safe Society, The Corrections and Conditional Release Act Five Years Later, Report on Consultations*, Ministry of the Solicitor General of Canada, 1998 at pages 45-46.

the Investigator was not solving their problems and criticized the fact that the Investigator was paid for by the same system they were grieving. It was suggested by some that the Investigator should be outside of the Ministry of Solicitor General Canada. Indeed, some respondents suggested that the current legislative enactment of the Correctional Investigator's powers under the *CCRA* was not sufficient and that the Investigator's function should be enshrined in its own statute and the office should report directly to Parliament. Some participants in the review went so far as to suggest that the Correctional Investigator have the authority to implement its own recommendations.

There was some indication however that the Correctional Investigator's office has had a positive effect on corrections. Some inmates felt that since 1990 they have had less of a need to access the office as more issues are being resolved faster and at the lowest grievance level. It was also noted that in some cases, simply mentioning the possibility of involving the Correctional Investigator helps to get the issue resolved. This effect demonstrates how even the presence of an effective and credible Organizational Ombudsman can serve to ensure that injustice and unfairness are prevented or remedied quickly.

MILITARY

Obviously, the most relevant Ombudsman's models for our purposes are those of the armed forces of other nations. Several have had Ombudsmen or their equivalent in place for decades. We examined various models, including the Australian, Norwegian, Swedish, American and German military Ombudsmen, who report directly to their respective legislatures. We concentrated on the Israeli and Netherlands models, as both report via their respective Ministers of Defence and both have a mandate to deal with systemic and individual injustices, and therefore most closely reflect that mandate conferred to me.

CLASSICAL OMBUDSMEN

United States Inspector General

The United States has had an Inspector General system for over 200 years. The Department of Defense Inspector General (DoD IG) has a mandate to "conduct objective and

independent audits, investigations, evaluations and other activities to prevent, detect and help correct problems in DoD programmes and to identify opportunities for improving efficiency and effectiveness".⁸³ The DoD Inspector General is staffed entirely by civilians and the IG reports directly to Congress. She monitors and coordinates the work of the military IG's, and has the authority to establish policies for them.⁸⁴

DoD IG will investigate serious cases and cases involving high-ranking officers and officials,⁸⁵ as well as allegations of reprisals or retaliation against whistleblowers anywhere in the armed services.⁸⁶ They receive approximately 16,000 calls per year, of which 2,000 to 2,500 are investigated.

The US Army also has an IG system, which operates in tandem with the chain of command. IG's are appointed to each base and command, and in turn report to an independent IG, who is normally a three-star general. He or she in turn reports to the Secretary of the Army. The local IG's have a reporting relationship with their base commanders.

IG's have a responsibility to inquire into and report on the discipline, efficiency, morale, training and readiness of the Army. Anyone may submit a complaint, allegation or request for assistance to any Army IG concerning matters of Army interest. IG's normally encourage members to discuss issues with the chain of command in the first instance, but this is not mandatory, unless other specific mechanisms are available. The mandate includes systemic issues, educating members in processes and procedures, and identifying responsibility for corrective action. Common requests for assistance are similar to those that have been forwarded to my Office to date; including non-support of family members, reprisals/whistleblowing,⁸⁷ and pay. The IG's have very wide powers of investigation.⁸⁸

⁸³ Department of Defense, Office of the US Inspector General, *Mission Statement*.

⁸⁴ Information supplied by Assistant US DoD IG Mr. Robert Lieberman at a meeting on September 25, 1998.

⁸⁵ Assistant US DoD IG Mr. Robert Lieberman advised that the US DoD IG investigates 400 senior officials per year. Complaints are substantiated in about 10 to 15 percent of cases.

⁸⁶ *The Doshen Paper #1, supra*, note 19 at pages H-1 to H-5.

⁸⁷ As noted above, these are normally passed on to US DoD IG for investigation.

Parliamentary Commissioner for the German Armed Forces

Germany has had a Parliamentary Commissioner for the Armed Forces since 1959.⁸⁹

He or she reports directly to Parliament and has a mandate:

[...] to take action should circumstances come to his attention which suggest a violation of the basic rights of service personnel or the principles of Innere Führung (a concept of leadership and civilian education that seeks to combine the demands of the military mission of the armed forces with the dignity and rights of service personnel as citizens of a democratic state).⁹⁰

The Parliamentary Commissioner's mandate does not extend to civilian German Armed Forces' employees. She may self-initiate investigations and has the discretion to investigate any matter brought to her attention; and must investigate when instructed by the *Bundestag* or Defence Committee. She has extensive powers of investigation, including the power to require the Federal Minister of Defence and his or her employees to answer her queries, as well as afford her access to their files. All federal, state and local government authorities are required to assist the Commissioner in conducting the necessary investigations. The Commissioner may enter any German Armed Forces premises without notice. She may "give the competent authorities an opportunity to settle a matter".⁹¹

The Commissioner may make recommendations at the appropriate level to resolve a complaint. The recommendations are not binding, but "carry considerable weight and are not easily ignored or evaded by defence agencies".⁹²

A member of my staff met with the Federal Republic of Germany Defence Attaché in Ottawa. The Attaché is a strong supporter of the Parliamentary Commissioner system, noting that the Commissioner is very powerful, has virtually free rein to determine when,

⁸⁸ Quoted in the *Doshen Paper #1*, *supra*, note 19 at pages 41 and H-1 – H-5. Some of this information came from a briefing given to members of my staff by two military members at CFB Petawawa on November 23, 1998. Both had recently attended the three-week IG course at Fort Belvoir, VA.

⁸⁹ Karl Gluemes, *The Parliamentary Commissioner for the Armed Forces: Her Role in Exercising Parliamentary control over the Federal Armed Forces and Processing Petitions from Service Personnel*, document provided to my Office by the Embassy of the Federal Republic of Germany, 1997 (revised).

⁹⁰ The *Doshen Paper #1*, *supra*, note 19 at pages E-1 to E-6.

⁹¹ For description of powers see *Act in Respect of the Parliamentary Commissioner for the German Armed Forces* (last amended March 30, 1990).

where and how she conducts her investigations and reports quickly. Normally, most investigations are completed within two months. He has had dealings with the Commissioner, and believes that the system works for the benefit of all concerned.

Australian Defence Force Ombudsman

The Australian Defence Force Ombudsman (DFO) is part of the Commonwealth Ombudsman, whose mandate includes a wide range of public sector administrative organs, including the Federal Police and Tax Office.⁹² The *Commonwealth Ombudsman's Act* was amended to add the DFO in 1983.

The DFO may investigate matters of administration related to the service of a current or former member of the Australian Defence Force (ADF), or matters that arise as a consequence of a person serving in the ADF. The mandate extends to dependants of members or ex-members in respect of service related allowances, pensions or other benefits. The DFO has discretion as to whether or not to investigate a complaint. The DFO may not investigate action taken in connection with proceedings taken against a member for an offence under the *Defence Force Discipline Act 1982*, or in respect of the grant or refusal to grant an honour or an award to a member.

The DFO will not investigate cases where the member is entitled to seek redress under existing regulations and has not done so, unless the DFO is of the opinion special circumstances exist. The ADF informs members seeking redress about their right to approach the DFO if they are not satisfied with the outcome or timeliness of the internal redress procedures offered by the Defence Force. The Commonwealth Ombudsman in his 1997-98 Annual Report notes that:

⁹² The *Doshen Paper #1*, *supra*, note 19 at pages E-1 to E-6.

⁹³ Much of this section is extracted from a letter to Lt.-Col. Pellicano (DPCR) from Col. Westwood, Director, Complaint Resolution Agency, Australian Department of Defence, dated November 2, 1998. Information was also obtained directly from a telephone interview with Ms. Susan Matthews, Director of Investigations, Australian Commonwealth Ombudsman, by a member of my staff, December 16, 1998, and from the *Commonwealth Ombudsman's 1997-1998 Annual Report*.

Delays in the redress process continue to be the basis of a significant number of complaints to my Office. The CRA (Complaint Resolution Agency) is working with us to explore ways to improve the effectiveness and the timeliness of the redress system.⁹⁴

ADF members can contact the DFO directly. The DFO also has the power to investigate both individual and systemic issues and to initiate an investigation on its own motion or at the request of the Chief of Defence Force. For example, in January 1998 the Ombudsman and the Vice Chief of the Defence Force jointly released a public report on systemic issues entitled “*Own Motion Investigation Into How the Australian Defence Force Responds to Allegations of Serious Incidents and Offences.*” The investigation behind the report was begun at the request of the Chief of Defence Force, as a result of an incident at an Air Force Base. As the investigation unfolded it took on two aspects:

Firstly, to identify and report on systemic issues arising from the way the Australian Defence Force responded to serious incidents and offences, particularly sexual offences. And secondly, the Ombudsman was investigating specific issues related to how the case was handled.⁹⁵

In response to the DFO’s recommendations, the ADF took actions which included developing a comprehensive draft investigations manual for commanding officers and investigating officers and considering a tri-service training approach for investigating officers.

The DFO has considerable powers of investigation. He or she is empowered by the *Ombudsman’s Act* to conduct investigations in such a manner as the Ombudsman thinks fit, and is subject to few restrictions. The DFO has many of the powers of a Royal Commission, including the power to examine witnesses under oath. He or she has access to all relevant documents.⁹⁶

⁹⁴ *Ibid.* at page 112.

⁹⁵ *Ibid.* at page 113.

⁹⁶ However, the Australian Federal Attorney General can serve the Ombudsman with a certificate preventing the Ombudsman from requiring a person to furnish information concerning a matter under investigation by the Ombudsman.

However, the DFO rarely has to resort to using his or her formal powers. The Ombudsman's investigations "are almost always conducted on the basis of voluntary co-operation on the part of the agencies and individuals".⁹⁷ For example, the ADF has issued a directive to all officers that they do not require a formal notice under section 9 of the *Ombudsman's Act* to produce documents. Such a formal notice to require production of documents is required however where the DFO seeks to get documents or files from other agencies outside of the ADF.⁹⁸

In many cases, the DFO's investigation does not go beyond reviewing the relevant documentation, however, ADF procedures make it very clear that the DFO has the capacity to complete extensive investigations if necessary. The following are extracts from a document prepared by the ADF outlining the relationship between the ADF and the DFO, and how ADF members will cooperate with the DFO:

The Ombudsman may investigate complaints by oral enquiry, by written request for comment, by examination of the files, by formal interview of relevant officers (sometimes under oath), or by combinations of these methods. The *Ombudsman Act* provide that investigations shall be conducted in such manner as the Ombudsman thinks fit, and the Ombudsman's officers may make direct inquiry to Service units or to individual members if and when considered necessary.⁹⁹

Inquiries generated by the Ombudsman have high priority, with a timeline of twenty days to provide a substantive reply. At the request of the Ombudsman any contemplated executive action relating to a complaint (for example, posting, recovery of overpayment) may be suspended until the Ombudsman completes the investigation.¹⁰⁰

⁹⁷ *Ombudsman's Office Interviews with Commonwealth Officials*, A paper prepared by the Ombudsman outlining guidelines for interviews with ADF officers at page C-2.

⁹⁸ Telephone interview with Ms. Susan Matthews, Director of Investigations, Australian Commonwealth Ombudsman, by a member of my staff, December 16, 1998.

⁹⁹ *Inquiries and Investigations by the Commonwealth Ombudsman and the Defence Force Ombudsman Affecting the Department of Defence and the Australian Defence Force*, background materials provided to my Office, paras. 7 and 8.

¹⁰⁰ *Ibid.* at paras. 17 and 19.

There are no military personnel involved in the DFO's reviews, though the Ombudsman may delegate investigations to ADF personnel to complete under his or her supervision.

The Ombudsman may make recommendations for appropriate remedy to the appropriate agency. A copy is provided to the Minister of Defence. If appropriate action is not taken within a reasonable time the Ombudsman may report the matter to the Prime Minister and to Parliament.¹⁰¹ If the Ombudsman's report includes express or implied criticism of a person or agency, then the Ombudsman must give that person or agency an opportunity to make submissions regarding the report. Normally, the Ombudsman will make available a draft of the document to the person or agency for comment prior to finalization.

Interestingly, there are numerous and striking similarities between the Australian Defence Force and the Canadian Forces. Both have approximately 60,000 serving members dispersed over a large geographical area, as well as overseas. Both have a budget of approximately \$9 billion.¹⁰² Both have many traditions and practices rooted in the British armed services. Many of the complaints and issues dealt with by the ADF Ombudsman correspond closely to those that my Office anticipates receiving.

Norwegian Ombudsman for the Armed Forces

The Norwegian Armed Forces Ombudsman has a mandate to "ensure that no-one suffers injustice while serving in the Armed Forces".¹⁰³ He or she has the power to investigate any matter to determine if an injustice has been done, and if so, "to see to it that corrective action is taken".¹⁰⁴

The Ombudsman may investigate, at his or her discretion, any case submitted to him or her by an individual, their next-of-kin, or by a committee of service personnel

¹⁰¹ *The Doshen Paper #1, supra*, note 19 at page D-8.

¹⁰² *Commonwealth Ombudsman Annual Report 1997-98, supra*, note 93 at page 11.

¹⁰³ All of the information in this section is extracted from a document entitled "*The Ombudsman for the Armed Forces – The Committee of the Ombudsman of the Armed Forces*", supplied to us by Lieutenant-Commander Christian Nordanger of the Office of the Defence Attaché, Royal Norwegian Embassy, Washington, D.C.

representatives where a case has been settled by them. He or she also acts as an adviser to all persons who are eligible for military service.

When the Ombudsman takes up a case, he or she initially refers it to the involved unit for a response. The Ombudsman is “empowered to deal with cases involving all authorities. He has access to all documents and information at every level of the Armed Force, unless security conditions render this impossible”.¹⁰⁵

The Ombudsman will take into account the interests of the complainant and the Armed Forces when formulating any recommendations. Once the recommendations are made “it is presumed throughout that the recommendations of the Ombudsman be implemented”.

Further, “the Minister of Defence and the *Storting* (The Norwegian national legislature) may require the Ombudsman to give an opinion on matters within his sphere of competence.”¹⁰⁶

Swedish Ombudsman

The Swedish Armed Forces have access to the Parliamentary Ombudsman, once military grievance mechanisms are exhausted. The Parliamentary Ombudsman “can visit units of the armed forces at any time to investigate complaints or just to talk to conscripts.”¹⁰⁷ On average, the Parliamentary Ombudsman deals with approximately ten cases per year originating from the military.

ORGANIZATIONAL OMBUDSMEN

Czech Republic Armed Forces Ombudsman

The Czech Republic Armed Forces has an Ombudsman-like institution. The incumbent is a civilian with a legal background. He advised me that he reports to the

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *A Benchmark Study of the Armed Forces of Australia, Italy, the Netherlands, Sweden, the United Kingdom and Canada*, Report to the Prime Minister, March 1997 at page 31.

Minister of Defence and that he has considerable investigative powers into matters of Human Rights and Freedoms for past and present members of the Czech Republic Armed Forces and their dependents.¹⁰⁸

Netherlands Armed Forces Inspector General

Although officially called the Inspector General of the Armed Forces, the Netherlands Inspector General has many features similar with my Office, and, indeed, his literature speaks of his Ombudsman function.¹⁰⁹ His task, in his own words, is to act as “a barometer, horsefly, oilcan and safety valve”.¹¹⁰ He works outside the chain of command and reports directly to the Minister of Defence. The office has been in existence since the end of the Second World War. He has a mandate to:

Inform and make recommendations to (the) Minister on request or on his own initiative, on matters relating to the Armed Forces, in addition to instituting investigations into, or fulfilling the role of mediator and adjudicator, in matters relating to individual Armed Forces personnel or former personnel, these being submitted to him in writing by, or on behalf of, the person in question or his next of kin.¹¹¹

His functions include giving advice, mediating at later stages in proceedings, networking and bringing any problems to the attention of those who can solve them. The two fundamentals of his office are independence and confidentiality.

The Inspector General has wide ranging investigative powers, including the right to access any place or document belonging to the Armed Forces, as well as the power to summon any Armed Forces personnel to a hearing. He deals with approximately five hundred cases per annum.

¹⁰⁸ Meeting with Czech Republic Armed Forces Ombudsman, Mr. Vladimir Tetur in Montréal, December 7, 1998.

¹⁰⁹ *The Function of the Inspector General of the Dutch Armed Forces*, November 1998, document provided by Lieutenant-Kolonel Plugge, Inspector General of the Netherlands. See also: *The Doshen Paper #1*, *supra*, note 19 at pages G-1 to G-5.

¹¹⁰ Presentation material supplied to my Office by the office of Inspector General of the Dutch Armed Forces.

¹¹¹ *Inspector General of the Armed Forces(Netherlands)*, Material provided to my Office, Duties at page 3.

Israeli Defence Force Soldiers' Complaints Commissioner

The Israeli Defence Force (IDF) has had a Soldiers' Complaints Commissioner since 1972.¹¹² He or she is appointed by the Minister of Defence, in consultation with the Minister of Justice and with the approval of the Foreign Affairs and Defence Committee of the *Knesset*.¹¹³ He or she has a mandate to investigate any act, if that act is:

- ◆ directly injurious to, or directly withholds, a benefit from the aggrieved soldier;
- ◆ relates to the rules and regulations of the service, the conditions of the service, or discipline;
- ◆ contrary to any enactment or to army orders, or is done without lawful authority, or is contrary to sound administration, or involves an excessively inflexible attitude or flagrant injustice.

In short, the Soldiers' Complaints Commissioner investigates alleged or apparent systemic and individual injustices. He or she possesses extensive investigative powers, including immediate, real time access to the entire IDF personnel records computer system, which he advises are essential in order to get the job done quickly.¹¹⁴

The incumbent travels extensively and meets frequently with troops and commanders. This results in him being able “to head off many problems before they become complaints”.¹¹⁵

He receives between 8,000 and 9,000 complaints per annum, and deals with 84 percent of them within two months of notification.¹¹⁶ His investigations involve getting all sides of the story, though he is not bound by procedural law or the rules of evidence. He works collegially with the chain of command. He recently reported that roughly 60 percent of complaints submitted to him are justified or partially justified.¹¹⁷ In these cases, he makes

¹¹² The office is also known as the Soldiers' Rights Commission.

¹¹³ The current Soldiers' Complaints Commissioner is Brig.-Gen. (ret'd) Uzi Levztur. I met with him on November 9, 1998 during the Consultation process.

¹¹⁴ *Military Justice Law* (Israel) Part II, 1972, Clause 551. The legislation governing the office stipulates that the Soldiers Commissioner “is entitled to investigate the complaint in any manner he deems, and is not bound to procedural law or to rules of evidence.” He may enter any IDF premises at any time to conduct his investigations.

¹¹⁵ *The Doshen Paper #1*, *supra*, note 19 at pages F-1 to F-5.

¹¹⁶ Soldiers' Complaints Commissioner's Office: Excerpts from the *Annual Report* (1997).

¹¹⁷ *Ibid.*

recommendations to redress the problem directly to the individual soldier's commander. These recommendations must be complied with unless overruled by the IDF Chief of Staff.

He reports annually to the Minister of Defence and is entitled to submit special reports during the year. Special reports normally deal with investigations into systemic issues. All reports are made public.

Brig.-Gen. (ret'd) Doshen conceded that the IDF Commissioner:

[...] appears to be well liked by junior personnel. Its longevity would suggest that the IDF is satisfied with it and that it effectively serves their members, even in times of hostilities.¹¹⁸

ANALYSIS

As I mentioned in the introduction to this report, Ombudsmanry is a fluid concept capable of adapting itself to the specific and particular needs of the institution it is intended to serve. The ultimate goal must be to create an effective and credible Ombudsman's Office. To that end, I carefully examined the advantages and disadvantages of each of the models outlined above.

The focus in TOA-style 'soft' Organizational Ombudsmanry is to assist the client to develop, and then pursue, his or her own options to resolve problems. The onus is on the client, not the Ombudsman, to be proactive and to achieve resolution. While there is scope to use these techniques in my Office in some cases, there is, in my opinion, a fundamental flaw in adopting this blanket approach in dealing with many of the people who are seeking my Office's assistance. As noted below, the DND/CF is a unique institution. It has working conditions and cultural values, far removed from those of the Massachusetts Institute of Technology or Anheuser-Busch, two of the founding members of the TOA.¹¹⁹ Many of the people who have already come to us for help have already exhausted their options. Some are frightened or intimidated. We have been told repeatedly that many members perceive a

¹¹⁸ *Ibid.* at page F-3.

¹¹⁹ Other founding members include Wharton School of Business and Polaroid.

widespread culture of reprisal and repression within the organization against anyone who breaks ranks. These are not fertile conditions for the limited TOA-style dispute resolution process.

Further, a pilot Alternate Dispute Resolution (ADR) programme under the direction of Mr. Peter Sterne, Executive Director - Conflict Management, is now being formed. It has a mandate to “assist CF members and DND employees resolve issues and complaints at the lowest possible level, before the problem becomes a formal complaint or grievance. The ADR programme will use formal mediation to resolve conflict.”¹²⁰ Mr. Sterne is currently designing a mediation process. This would leave the Ombudsman free to deal, among other things, with more systemic and serious matters in addition to supporting the use of mediation, when appropriate.

Dr. Rowe, a co-founder of the TOA, has been in the field of corporate and academic Organizational Ombudsmanry for 25 years. She states that aspects of the Canadian Organizational Ombudsman tradition are far different than the US-designed model that she represents. This is particularly the case in the academic field, where Canadian Ombudsmanry has a strong track record of employing many of the features of classical Ombudsmanry, albeit that they remain Organizational Ombudsmen in the wider sense. Dr. Rowe writes that:

[...] some organizational ombudsmen who serve the employers clients do so a manner similar to that of classical, statutory ombudspeople. That is, some client ombudspeople may on occasion look into a problem and issue a written report.¹²¹

In a telephone interview with a member of my staff, Dr. Rowe acknowledged that while the TOA model had a great deal to offer “you may have more need of a classical model”, not necessarily because of the military context, but because we were operating in Canada. She indicated that a “US-made” solution is possibly inappropriate in these circumstances.

¹²⁰ *A Commitment to Change: Report on Recommendations on the Somalia Commission of Inquiry, supra*, note 39 at page 16.

¹²¹ *Options, Functions and Skills: What an Organizational Ombudsperson Might Want to Know, supra*, note 49 at page 3.

The inadequacies of a TOA-style model quickly became apparent during the consultation process. On October 21, 1998, speakers from the “Between Us” programme gave a presentation to a group of approximately three hundred mainly senior and middle ranking DND/CF personnel at the Defence Ethics Conference held in Ottawa. Reaction from the audience, both anecdotally and in written questionnaires submitted at the conclusion of the conference, was almost universally negative. The vast majority of respondents felt that the “Between Us” model was clearly unsuitable or irrelevant in the DND/CF context. Comments ranged from the perplexed to the derisory. As one audience member wrote, “[t]he objectives of a financial institution differ significantly from those of the military”. One senior participant went even further:

Doshen was here a few years back and he was looking at setting up this Ombudsman office in Ottawa, with five people dealing with issues. This cannot work. [...]. Then he proposes the Toronto Dominion model. We are not an organization dealing with simple issues. That model does not work with our reality. I saw the conference in Ottawa and they have a simple set up to listen to people and don't tackle any issues.¹²²

Comments from other attendees included:

- “Even if you want to deal with an Ombudsman process, a money making operation has very different requirements.”
- “Don't see the connection.”
- “How can they deal with real issues?”
- “They have no investigative authority - when they were discussing the setting up of the DND/CF Ombudsman, the TD Ombudsman was proposed as a model. I am relieved to see we are not going that route because we need something that is much more effective.”¹²³

¹²² Meeting with Senior Military and Civilian Personnel, CFB Halifax, October 26, 1998.

¹²³ All the above comments are responses to a written questionnaire submitted at the conclusion of the Defence Ethics Conference held in Ottawa, October 20 and 21, 1998.

The reaction was similar when we discussed the TD-type dispute resolution process during the consultation process:

- You can't compare the Canadian Forces to the Toronto Dominion Bank. (*Meeting with Senior NCMs, CFB Trenton, September 8, 1998*)
- [A] corporate model like TD Ombudsman won't work, the difference between us and a corporation is the chain of command. (*Meeting with Officers, CFB Gagetown, October 29, 1998*)
- I've been through touchy-feely...no thanks. You can't compare managerial and command systems. (*Telephone interview, RCA Officer, December 15, 1998*)

Even the use of the name "Ombudsman" by "soft" model practitioners has been the subject of sometimes heated debate in the field. There is considerable disagreement as to whether Organizational Ombudsmen who limit themselves to the ten functions: listening/venting; providing information; reframing issues/developing options, referring, advice/coaching, looking into a problem, formal mediation, propose changes to policies and practices, monitoring and upward referral of trends, actually qualify to use the name "Ombudsman". Some Ombudsmen who have powers to investigate have adopted the term "real Ombudsmen" when comparing themselves to the TOA model. A paper to the American Bar Association in 1997 was entitled "*American Ombudsmen and others; or, American Ombudsmen and "Wannabe" Ombudsmen.*" The author argues that, while the TOA model has some merit, it is not Ombudsmanry in any real sense of the word, rather a "thinly disguised alternative dispute resolution mechanism without the powers needed to be effective Ombudsmen".¹²⁴

Interestingly, in 1991, the government of New Zealand passed legislation prohibiting any institution or business using the name "Ombudsman" unless approved. The reasons it did so were articulated by Mr. John Robertson, the Chief Ombudsman of New Zealand and President of the International Ombudsman Institute, who stated:

¹²⁴ Larry B. Hill, *American Ombudsmen and Others; or, American Ombudsmen and Wannabe Ombudsmen*, Address delivered at the 1997 spring meeting of the American Bar Association, April 18, 1997. Professor Hill stated that "[...] my overall conclusion is, however, that organizational Ombudsmen's offices are simply mediators. Real Ombudsmen are not, however, generally described as mediators. Although they might sometimes perform some functions as mediators, Ombudsmen are institutions that are involved in doing impartial investigations of citizens' complaints."

For some twenty years the word (Ombudsman) in New Zealand was synonymous with an independent parliamentary officer to whom citizens could turn for help in resolving their grievances with the bureaucracy. However, in a sense, therein lay the trap. **The word became a symbol which conveyed a sense of fair play and justice in the resolution of grievances, and was seized upon overseas, and particularly in North America, by private sector consumer interest groups for a myriad of consumer grievance procedures.** I became concerned at the potentially adverse effects which proliferation of the term Ombudsman for a wide variety of grievance procedures might have on the status and integrity of the Parliamentary Ombudsman in New Zealand [...] **The value of the office of the Ombudsman to the public should not be diminished by unnecessary confusion as to what an Ombudsman is or does.**¹²⁵ (Emphasis added)

The Chief Ombudsman of New Zealand, to whom the authority to grant permission was delegated, wrote that “[a]s a general rule, an Ombudsman scheme will only be granted the use of the name Ombudsman if it is independent, accessible, fair and effective.” (emphasis added) To qualify to use the name an organization must ensure that, *inter alia*, the Ombudsman has the capacity to:

[...] **receive complaints** directly from a complainant, free of charge; **investigate the facts** impartially; *conclude with a decision* to sustain or not sustain; and, if appropriate, **achieve a remedy**. The position will need to be seen to be independent and impartial by both the consumer and the organization to ensure maximum effectiveness and influence.¹²⁶ (emphasis added)

In May 1994, the British and Irish Ombudsman Association (BIOA) issued guidelines for the use of the word Ombudsman. The reasons they did so are undoubtedly similar to those voiced by the Chief Ombudsman of New Zealand. They determined that:

¹²⁵ John F. Robertson, *Protection of the Name “Ombudsman”*: Occasional Paper #48, International Ombudsman Institute, February 1993.

¹²⁶ *Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at page 15, para. 3. The authors also state at page 9 that “[t]he Ombudsman is an independent governmental official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints.” This is similar to the American Bar Association definition of an Ombudsman.

[...] the term “Ombudsman” should only be used if four key criteria are met. These criteria are: independence of the Ombudsman from those whom the Ombudsman has the power to investigate; effectiveness; fairness and public accountability.¹²⁷

When examining the various organizations and models, I was particularly attracted to an argument advanced by Dr. Patrick Robardet, Director of Legal Affairs and Research, Office of the Québec Ombudsman. He writes that military Ombudsmen fall into the category of public sector “Specialty Ombudsmen”, which he defines as an Ombudsman who “intervenes only in specific areas of government activity or regarding limited categories of complaints or complainants.”¹²⁸ However, according to Dr. Robardet, there are “fundamental principles [that] unify all [Ombudsmen] offices and that there exists a core of functions and criteria for effectiveness, common to all offices.” He identifies these as independence, accessibility, credibility and flexibility. He continues that:

[...] in spite of this common core, **a new office has to be made to measure, it cannot be imported wholesale or bought off the peg.** In addition, Ombudsmanship [...] remains a fluid craft.¹²⁹ (Emphasis added)

I agree. DND/CF is a unique organization with unique needs. As the Canadian International Development Agency (CIDA) Ombudsman pointed out during the consultation process, the DND/CF is virtually a government within a government, with its own code of discipline, health care system, infrastructure, policing and judicial system.¹³⁰ Its employees are subject to terms and conditions of employment far removed from, and far more onerous than, those experienced by most others within or without of government. The DND/CF personnel are members of an organization that has the capacity to impinge upon almost every aspect of their lives, including those times when they are not on duty.

¹²⁷ *Ibid.* at page 12. The authors state that according to the BIOA an Ombudsman should “[b]e entitled to investigate any complaint made to the Ombudsman which is within the Ombudsman’s jurisdiction without the need for any prior consent of the person or body against whom the complaint is made.”

¹²⁸ *Setting Up An Ombudsman Office: A Checklist (Basic Principles, Statutory Provisions, Organization and Practices)*, *supra*, note 2 at page 3.

¹²⁹ *Ibid.*

¹³⁰ Meeting with Mr. J.P. Bolduc, CIDA Ombudsman, December 7, 1998.

The tools and powers available to the DFAIT, DIAND or CIDA Ombudsman, who, between them, deal with less than 460 “contacts” per year, are grossly insufficient to meet the needs of this Office. For example, we cannot conceivably manage an effective operation by shredding notes and keeping no records. Additionally, and as discussed elsewhere in this report, TOA-style ombudsmanry is not an appropriate approach to deal effectively with systemic issues, which form a very important part of my mandate.

As was so evident at the Defence Ethics Conference, and throughout the consultation process, an Organizational Ombudsman modeled solely along the TOA Organizational Ombudsman model will have no credibility virtually anywhere within the DND/CF, or, ultimately, with the public. One of the reasons this Office was created was “to send a strong signal to members that the organization cares about individuals.”¹³¹ It became very clear during the consultation that a TOA-type Ombudsman model will not convey that message, and, because of its inherent powerlessness, may indeed produce the opposite effect. While I anticipate that many of the tenets of TOA-style ombudsmanry will be indispensable in resolving problems at a low level, this approach alone is not sufficient, in and of itself, to provide the foundation of a viable office.

We found no examples of military Ombudsmen who had adopted the TOA Organizational Ombudsman approach, most likely because it is clearly so unsuitable for a military environment. We also contacted staff at NDHQ who advised us that they were not aware of the existence of a “soft” approach military Ombudsman office anywhere in the world.¹³² When I met with the Israeli Defence Force Soldiers Commissioner, I asked him about mediation. He stated that he is not often a mediator. The head of his legal department, Colonel Stern, stated that:

[...]sometimes when soldiers complain to us about his commanding officer we mediate and try to settle at this point. This is very rare and not what we do. It's nice to be soft, if the two parties are of equal power; otherwise it's not very good. It does not work. Mediation would only be used if there is no cause for investigation. Investigative powers are very important.¹³³

¹³¹ *Briefing Note* for the DND Deputy Minister, February 12, 1997 at page 3.

¹³² Various conversations with the DND/CF Executive Director - Conflict Management and Director Personnel Complaints Resolution staff.

¹³³ Meeting with IDF Soldiers' Complaint Commissioner, November 9, 1998.

Ultimately, I believe that we need to build an Ombudsman's Office tailored to the requirements of the unique organization we oversee. To do that means we must incorporate many of the features from the empowered organizational and classical Ombudsmen fields. The issue of which category we fall under may be more of an academic exercise. In my view, all that matters is that the Office has the tools to be effective and credible from the outset, subject, of course, to the initial public policy parameters you have set.

3

CHAPTER THREE

A BLUEPRINT FOR AN EFFECTIVE AND CREDIBLE DND/CF OMBUDSMAN

There are several common denominators to all effective Organizational Ombudsmen, whether from the civilian or military fields. They are as follows:

- ◆ Independence and Impartiality;
- ◆ Confidentiality;
- ◆ A credible review and investigative process.

The first two are dealt with in this chapter. The third point is the topic of the next chapter.

INDEPENDENCE AND IMPARTIALITY

PRINCIPLE

Independence is the hallmark of the Ombudsman institution – it is the foundation upon which this Office must be built. Since my appointment, and throughout the consultation process I was constantly reminded of the importance of actual and perceived independence. The message was overwhelming. For this office to achieve the high level of credibility required to meet the needs of its constituency, it must first and foremost be an independent and impartial agency.¹³⁴ I was constantly reminded during the consultation

¹³⁴ *Setting Up An Ombudsman Office: A Checklist (Basic Principles, Statutory Provisions, Organization and Practices)*, *supra*, note 2 at section 2.1.1. “As an impartial and politically non-partisan investigator of complaints, the Ombudsman must not only be free from interference in his function but he must also be perceived as being free from interference. This prevents problems of perception from developing.” See also: William K. Reid, C.B., *The Protection of Citizens as “Consumers” of Government Services: Occasional Paper #52*, International Ombudsman Institute, January 1995 at page 2, “Most important, independence is paramount.”; *Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at page 2. “There will be no public trust in decisions made by a body investigating Government if that body is perceived to be biased and if it is seen as a creature of Government. Ombudsmen are independent so they may be impartial. Their findings and decisions are based on examination and analysis of the facts and law. They must be independent and avoid

process that a high degree of independence is required to set-up a credible arms-length agency which will be able to conduct business free from actual and perceived interference:

- If not independent better stop now. *(Telephone interview with Lieutenant-Kolonel Plugge from the Office of the Inspector General of The Netherlands, November 6, 1998)*
- Independence is crucial. *(Brigadier-General (ret'd) Uzi Levztur, Israeli Defence Force Soldiers' Complaints Commissioner, November 9, 1998)*
- Independence is a feature of a quasi-judicial organization and is crucial for the Ombudsman's Office. *(Meeting with Professor Ed Ratushny, Ottawa University Law Faculty, October 19, 1998)*
- *Il y a des choses sur lesquelles tu ne pourras pas faire de compromis : ton indépendance et la perception de ton indépendance. (Meeting with the Honourable Mr Justice Gilles Lévesque, September 30, 1998)*
- There is a need for someone with credibility, independence and a voice as to what is happening – an unbiased view. *(General Comments, Velika Kladusa, Bosnia, November 11, 1998)*
- There is a need for an Ombudsman if he is independent and has no bias. *(Meeting 1 AMS Technicians, 4 Wing Cold Lake, September 15, 1998)*
- *L'ombudsman indépendant pourrait s'occuper efficacement et équitablement des droits, intérêts, problèmes et plaintes des membres des Forces canadiennes. (Ombudsman pour les Forces Canadiennes: Un besoin urgent, le 2 mai, 1997)*
- You must be totally independent and neutral. *(Meeting with Ms. Isabelle Massip, Department of Foreign Affairs and International Trade Ombudsman, August 18, 1998)*
- If you lose the independent flavour of the Ombudsman, you will lose credibility as a separate entity. *(Meeting with DCDS, Ottawa, August 12, 1998)*
- Not only need to be independent, need to have the people believe you are independent. Sailors will believe what they believe. Beware of not looking like another part of the system. *(Meeting with Senior Officers and Senior Union Staff, CFB Halifax, October 26, 1998)*
- Ombudsman has to be completely independent. *(Meeting with Senior Officer, CFB Gagetown, October 29, 1998)*
- Have to be seen as having independence and neutrality. *(Meeting with an ADM, Ottawa, August 18, 1998)*
- Confidentiality and independence are crucial for your office to be effective and credible. *(Luncheon – NATO, Brussels, November 4, 1998)*
- Need independence, need to be outside military structure. *(Meeting with Senior Civilian at NDHQ, September 22, 1998)*

even the appearance of serving the interests of the organizations they investigate if complainants are to trust the results of their investigations."

- Independence is the most critical determinate of an Ombudsman's effectiveness. (*Mr. Kent D. Anderson, Occasional Paper #41, International Ombudsman Institute*)
- The real measure of his success won't be in the number of complaints brought to his attention, but in the level of independence he'll be given. (*Editorial, Ottawa Sun, June 11 1998 at page 13*)

The need for independence and impartiality was also discussed in-depth in the *Report of the Committee on the Concept of the Ombudsman*.¹³⁵ The Committee¹³⁶ had a mandate to evaluate the need for a Federal Ombudsman.¹³⁷ It recommended the creation of the Office, noting that: “[b]y definition, an effective Ombudsman must possess a high degree of independence”.¹³⁸

Independence is needed to ensure actual and perceived impartiality and to establish an arms-length relationship between the Ombudsman's Office and that of the Minister's. This will serve to safeguard against suggestions that the Minister could interfere in the Ombudsman's decision-making ability. This perception of independence and protection from interference by government is crucial and requires strong safeguards to foster confidence in the Ombudsman's neutrality. The importance of these principles was recognized by the Auditor General in his recent report on the Canadian Human Rights Commission (CHRC) and the Canadian Human Rights Tribunal (CHRT). The Auditor General's report noted that:

In certain instances the perception of the independence of the Commission and the Tribunal from the government is strained. These instances involve major cases where government, as the employer, is the respondent before the Tribunal and where additional major funding is required for lengthy hearings. In such instances, the Treasury Board is both the approver of requests for such funds and the respondent to the case being heard.¹³⁹

Although the report did not find any evidence that the government was using funding controls to interfere with the Commission or the Tribunal's functions, it did note that there

¹³⁵ *Report of the Committee on the Concept of the Ombudsman, supra*, note 43 at page 33.

¹³⁶ The committee was made up of Deputy Ministers and senior civil servants selected by the then Prime Minister The Right Honourable Pierre Elliot Trudeau.

¹³⁷ The 1977 Report actually lead to the *Ombudsman Act*, Bill C-43 (April 5, 1978), *supra*, note 43.

¹³⁸ *Ibid.* at page 33.

¹³⁹ *Auditor General of Canada Annual Report 1998*.

was an absence of legislative safeguards to ensure the CHRC and the CHRT's organizational independence.¹⁴⁰

An Ombudsman who is perceived as being independent and impartial will be able to maximize accessibility for all members and offer an additional and distinct mechanism of voice. Potential complainants will be able to reach their Ombudsman assured that their complaints will be considered on their merit – free from interference or influence of any kind.

IMPLEMENTATION

RELATIONSHIP BETWEEN THE OMBUDSMAN AND THE MND

The Ombudsman must be free to exercise complete operational control.¹⁴¹

- You need to be on an island. You need to do everything you can to retain control of your administrative decisions. This serves as protection for you and for the Minister who can isolate himself from the perception of interference in the running of your office. *(Meeting with Mr. Dan Dupuis, Director General Investigations and Reviews, Office of the Information Commissioner of Canada, December 10, 1998.)*
- Cannot have any interior people, such as the Minister, the CDS, the DM or anybody else looking over your investigations and your operations. *(Meeting with Lieutenant-Kolonel Günter Schoof, Embassy of the Federal Republic of Germany, Ottawa, December 7, 1998)*
- Should not compromise administrative independence to DND. *(Meeting with an ADM, Ottawa, August 12, 1998)*

To achieve this goal, the Ombudsman must be given complete autonomy regarding the conduct of daily operations. If one were to make an analogy with the private sector, the Minister, as the person to whom the Ombudsman reports, could be seen as Chair of the Board who gives the general policy direction of the office. The Ombudsman would be acting as the chief executive officer, having supervision over, and direction of, the daily operations of the Office and of its staff.

¹⁴⁰ *Ibid.* at para. 10.27.

¹⁴¹ *Report of the Committee on the Concept of Ombudsman, supra*, note 43 at pages 33-34. "In another sense, independence is also dependent on appropriate arrangements relating to such questions as salary and pension rights, the term of appointment and the methods of removal, and the degree to which an Ombudsman is given power to control the human and financial resources allocated to his office."

This means the Minister may set the general policy directives for the Office. Once the directive has been issued, the day-to-day running of the operations of the Office shall be the sole responsibility of the Ombudsman. It is the Ombudsman who has the discretion and authority to make all other decisions. These would include invoking the mandate,¹⁴² prioritizing cases, determining whether and how investigations will be done, hiring of staff, how the budget shall be allocated and when to issue public reports.

I therefore recommend that:

The Ombudsman should have complete operational control and discretion in the exercise of the Office's functions, duties, policies, procedures, expenses and responsibilities.

Another important aspect of operational independence is the reporting relationship between myself as the DND/CF Ombudsman and yourself, as the Minister. Given that my mandate is not defined by legislation, it is imperative that the DND/CF members and members of the public be made aware of any general policy directives that are issued by yourself to my Office. The best vehicle for assuring this public awareness is to table any such directives in the House of Commons. Transparency and accountability require that the DND/CF members and members of the public be informed specifically of when directives are issued to my Office and their content. This openness will take away the basis for any suggestion that there may be or has been any undue influence or interference in the functions of my Office and will serve as an important safeguard to the overall independence of my Office.¹⁴³

¹⁴² This issue of invoking the mandate is subject to the recommendation concerning "MND Directed Investigations". For in-depth discussion on this point, see Chapter 4 under sub-heading "The Mandate" at page 138 of this Report.

¹⁴³ *Report of the Auditor General, supra*, note 139 at para. 10.27 which stresses the importance of strong safeguards to ensure independence in the context of the CHRC and the CHRT.

I therefore recommend:

When the Minister of National Defence issues a general policy directive to the Ombudsman, it shall be made public and tabled in Parliament.

FUNDING

Since my Office will be receiving actual complaints from the DND/CF members, I will be in the best position to assess their needs and accordingly how and where the resources of this Office should be allocated. This financial and operational independence is needed to guarantee an effective and credible office that will be able to be an agent of change for the DND/CF members.

During our consultations we encountered many questions about to the funding of our Office. Some individuals were sceptical of the office having independence if I, as Ombudsman, reported to the Minister and were funded from the DND budget:

- We have spent more money on things much less important. I think it's a good thing to spend money on setting up the Ombudsman's office and it must be given the resources to work. *(Meeting with 1 AMS Group, 4 Wing Cold Lake, September 15, 1998)*
- You need independent funding from the department in order to maintain the independence of the office. *(Meeting with 2PPCL1 Officers, Winnipeg, September 17, 1998)*
- They will not give you the budget you need. *(Meeting with Me Simon Noël, Q.C., Hull, September 22, 1998)*
- You can be controlled by being granted inefficient resources, as we are given, and it will create a perception problem, and in this game perception is everything. *(General Comments, Velika Kladusa, Bosnia, November 11, 1998)*
- Will the people who control your budget control you guys? Will they dictate your response as well? *(Meeting with Technical Staff, CFS Leitrim, November 25, 1998)*
- Is your budget coming out of our next pay raise? *(Meeting with Personnel from 402 Squadron, Winnipeg, September 16, 1998)*
- Make sure you have enough money to operate. *(Meeting with Mr. Ron Stewart, Correctional Investigator, Correctional Investigator Canada, Ottawa, December 16, 1998)*

- If don't go all the way – don't go at all. (*Meeting with Senior NCMs, Edmonton, September 1, 1999*)
- Is this just another smoke and mirror, throwing out money with no consideration for the soldiers? (*Luncheon with Officers, Edmonton, September 1, 1998*)
- *Votre budget vient-il de notre budget? Je ne voudrais pas que vous puisiez des fonds de mon commandant. Si vous venez de ma paie ou de mon augmentation salariale, je ne suis pas certain que j'ai besoin d'un Ombudsman. (Rencontre avec les Employés Civils de la 3^{ème} Escadre, Bagotville, le 29 octobre, 1998)*
- The Minister should fund you the same way he funds us - in an inefficient way which will have you doing less with less. (*Meeting with members at Golan Heights, Israel, November 7, 1998*)
- A properly funded and operated office will be dollars well spent and increase combat capability. (*Meeting with 1 CAD Personnel, Winnipeg, September 16, 1998*)
- If don't have the resources, pack up your stuff and go home. (*Meeting with Senior NCMs and Civilian Personnel, 8 Wing Trenton, September 8, 1998*)
- Who pays your salaries? The fact that DND is paying, don't you think the Minister will be able to lean on you? You should be paid from an independent source. (*Standing Luncheon with Canadian Forces School of Administration and Logistics Personnel, CFB Borden, September 28, 1998*)

It is apparent that safeguards have to be put in place. Such safeguards would, in turn, ensure financial and operational independence and achieve a more correct perception that the funding of my Office is not a source of control or influence from the government. A perception to the contrary would undoubtedly hinder the credibility of my Office.

Other arms-length agencies that require independence and the perception of independence have addressed this concern by receiving their funds directly from Treasury Board. These agencies include the RCMP External Review Committee, the Office of the Information Commissioner of Canada and the Office of the Commissioner of Official Languages.

The Correctional Investigator reports to, and is funded by, the Ministry of Solicitor General Canada. It was reported that some offenders “were critical of the fact that the

Correctional Investigator is paid by the same system that they were grieving” and felt the Correctional Investigator should be paid by an outside source.¹⁴⁴

I have recently been advised that any funding request is to be sent directly to the Minister of National Defence’s Office for approval. While on a temporary basis I find this arrangement to be fully satisfactory, to ensure independence and to address the concerns that the Ombudsman’s Office may be influenced by an outside source once we are operational, the budget for my Office should be allocated directly from Treasury Board. I note, in passing, that every request for funds since my appointment was favourably received and we did not encounter any difficulty whatsoever in obtaining same.

In the alternative, the Ombudsman’s budget should figure on a separate line from departmental expenditures and the amount of the budget should be determined and assessed by an independent agency outside of the DND. This outside independent assessment agency should be chosen by the Ombudsman in a public, transparent and accountable fashion to preserve the independence and impartiality of the office.

In order to enhance transparency and accountability, the budget for my Office will also be included as part of my Annual Report.¹⁴⁵ This will ensure that the members of the DND/CF and the public are kept informed of my Office’s expenditures and are able to verify the efficiency and effectiveness of my Office. The importance of keeping the public informed of the cost effectiveness and performance of an organization such as my Office, was highlighted by the Auditor General in his recent report on the CHRC and the CHRT:

¹⁴⁴ *Towards A Just, Peaceful and Safe Society: The Corrections and Conditional Release Act Five Years Later*, supra, note 82 at page 45.

¹⁴⁵ See for example *Australian Commonwealth Ombudsman, Annual Report, 1997-1998*; *Information Commissioner Annual Report 1997-1998* at pages 66-68; *Office of Privacy Commissioner 1997-1998 Annual Report* at pages 102-103; *CHRC 1997 Annual Report* at pages 71-73; *Saskatchewan Ombudsman - Annual Report 1997* at page 6; *Ontario Ombudsman - Annual Report 1997/98* at page 13; *British Columbia Ombudsman Annual Report 1997* at page 28; *Office of the Ombudsman of Alberta, 31st Annual Report 1997* at page 7; *Protecteur du citoyen du Québec Annual Report 1996-1997* at page 117.

While bodies such as the Commission and Tribunal need to be independent of government, appropriate accountability procedures for the expenditure of public funds are necessary. Parliament needs information that provides assurance that the members of such bodies are working diligently within their mandate, and that the agencies are operating effectively and efficiently.¹⁴⁶

I therefore recommend that:

The DND/CF Ombudsman should be funded directly from Treasury Board.

In the alternative, the budget for the Ombudsman's Office should appear as a separate line from other departmental expenditures. Further, the Minister of National Defence should approve the Ombudsman's budget based on an individual assessment of the needs of the Office conducted by an agency outside of the DND to be appointed by the Ombudsman.

To ensure transparency, openness and accountability, the Ombudsman's budget shall be reported publicly in the Annual Report.

In order for my Office to be an effective and credible instrument of change, it must also be funded in such a way that it does not control or limit the operational challenges that lie ahead. The Office must be funded for it to accomplish its objectives and meet the needs of the DND/CF members otherwise "[c]onstraints can amount to an erosion of the Ombudsman's independence".¹⁴⁷

Therefore I recommend that:

The Ombudsman's Office should be resourced to fulfil its functions. The Ombudsman's Office should be able to spend and account for its funds directly.

¹⁴⁶ *Report of the Auditor General, supra*, note 139, para. 10.92.

¹⁴⁷ *Setting Up An Ombudsman Office: A Checklist (Basic Principles, Statutory Provisions, Organization and Practices)*, *supra*, note 2 at s. 3.1.2.

STAFFING

OMBUDSMAN AS SOLE AUTHORITY EMPLOYER

PRINCIPLE

Regardless of the strength and efficiency of any Ombudsman, he or she will be unable to run an effective Office by him or herself. I will be required, in many cases, to delegate my powers and to rely on my staff to ensure a smooth day-to-day running of my Office.¹⁴⁸ My staff will be responsible for direct dealings with members of the DND/CF who bring their complaints to my Office, as well as for the investigation of complaints. In many cases they will also work to help facilitate the resolution of complaints. Ombudsman staff often perform work that is sensitive, delicate or confidential.¹⁴⁹ My staff will also be responsible for carrying out and adhering to the Office policies and procedures, which assure the important qualities of independence, neutrality and confidentiality. In short, the Ombudsman's staff serves as the backbone of the Office.

Because of the great degree of reliance that an Ombudsman must place on his or her staff, it is important that the staff share the same high degree of integrity, neutrality and independence, as the Ombudsman. It flows from this that I must be given the freedom to select the best qualified persons for the positions in my Office. I must also be free to select staff members in whom I can place my trust and whose loyalty I can be assured of:

The delicate and sensitive nature of the Ombudsman's work requires a high degree of trust and confidence in staff because much is delegated to them, so the Ombudsman should be free of civil restraints in hiring and firing.¹⁵⁰

The selection of staff is an integral part of the perceived independence of the Ombudsman's Office. "When the office is set up it must reflect the independence of the

¹⁴⁸ See: Provincial Ombudsman statutes, which specifically provide for the delegation of the Ombudsman's powers to staff. Although powers of recommendation, delegation and reporting are usually reserved to the Ombudsman, most other powers can be delegated to staff. Alberta's *Ombudsman Act*, R.S.A., c.O-7 s. 26; British Columbia's *Ombudsman Act*, R.S.B., c.340 s. 30; New Brunswick's *Ombudsman Act*, R.S.N.B. c.O-5 s. 9; Ontario's *Ombudsman Act*, R.S.O. c.O-6 s. 26. See also: *Auditor General Act*, R.S.C. 1985, c.A-17, s. 18.

¹⁴⁹ *Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at page 3.

¹⁵⁰ Dean M. Gottehrer, *Ombudsman Legislative Resource Document: Occasional Paper #65*, International Ombudsman Institute, March 1998.

Ombudsman.”¹⁵¹ I was appointed as the Ombudsman by yourself, as the Minister of National Defence, from outside of the DND and the chain of command and outside of the restrictions of the Federal Public Service Commission. This was done in order to ensure my neutrality and independence and that I was truly at arms-length from both the DND/CF and the federal government as a whole. To maintain this arms-length relationship between my Office, and the DND/CF and the federal government, my Office must be treated as a separate office and employer. My Office’s employees must be selected by myself, as the Ombudsman and according to the terms and conditions of employment, which I have set for my Office. These employees must be answerable solely to myself as the Ombudsman and not to any other government department or anyone within the DND/CF.

The selection of my staff must also be done outside of any DND/CF or federal government public service restrictions. My staff must appear independent and possess objectivity. They must be loyal to my Office and not to any other cause or authority. In order to ensure the independence and loyalty of my employees, I must, as the Ombudsman, retain the sole power to appoint staff and to set the terms and conditions of employment.

My staff’s duties will not be limited to the day-to-day operations of my Office. My employees will also serve to advise and counsel me on specific issues. I must be able to rely on their judgment and experience. This requires the freedom to select those persons whom I feel possess the unique qualities and characteristics that can best meet the needs of my Office. I must retain the sole power to appoint and remove staff to ensure that I can have full confidence in my employees and in return I will have absolute loyalty from them.¹⁵²

¹⁵¹ Meeting with Ontario Ombudsman Legal Staff, September 9, 1998.

¹⁵² *Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at page 3.

The relationship between independence and control over resources and staffing, was also recognized by the committee, studying the concept of a Federal Ombudsman for Canada:

In another sense, independence is also dependent on appropriate arrangements, relating to such questions as salary and pension rights, the term of appointment and the method of removal and the degree to which an Ombudsman is given power to control the human and financial resources allocated to his office. The Committee has concluded that such arrangements should be made.¹⁵³

The Committee also concluded that the need for adequate staff was directly related to the Ombudsman's ability to maintain a credible Office:

The appropriate initial approach, we believe, is to strike a balance. Failure to provide a staff adequate for the prompt acknowledgement and referral of all complaints received and for the investigation of those requiring that type of treatment, would place the credibility of the office at risk, both with the public and the bureaucracy.¹⁵⁴

The American Bar Association Ombudsman Committee recommendations for the establishment of Ombudsmen offices by state and local governments, sets out 12 essential features for an Ombudsman's office. One of these features is: "(6) freedom of the Ombudsman to employ his own assistants and to delegate to them without restrictions of civil service and classification acts".¹⁵⁵

The importance of the relationship between my independence and my ability to control the terms of employment of those who work for my Office, became readily apparent, during my initial attempts to staff my Office and also during the writing of this report.

As indicated earlier, as the Ombudsman, I have been appointed to a renewable three-year term, subject only to "good behaviour". During the initial consultation and set up phase, it was necessary for me to hire staff to perform administrative duties and staff to perform research and advisory duties and to assist in the writing of the *Action Plan*. This staff was set

¹⁵³ *Report of the Committee on the Concept of the Ombudsman, supra*, note 43 at pages 33-34.

¹⁵⁴ *Ibid.* at page 39.

up on a temporary basis, with a permanent staff to be hired once the mandate of the Office was formally established. A director of communications, a senior policy advisor and three lawyers were hired as researchers/policy advisors to assist in the consultation process and the drafting of the *Plan*. Administrative staff was also provided in the form of two civilian and two military personnel on secondment from the CF and a temporary receptionist, provided through a private agency. The involvement of the military personnel in the setting-up of the Office and the consultation process was strictly on an administrative and support basis, given the potential for conflict that might arise due to their continued employment with the DND. My administrative and support staff were not directly involved in drafting my *Action Plan* or my recommendations.

In order to provide for a temporary staff for my Office, resort had to be made to a hodgepodge of programmes and temporary contracts to procure positions for my staff. Two staff members (my senior policy advisor and an experienced counsel) were brought into my Office through the Interchange Canada Programme on terms of twelve and six months respectively. Interchange Canada is a developmental programme that promotes and facilitates the exchange of employees through assignments, between the public service and organizations in other sectors located in Canada. Although this is a relatively fast method of staffing, it allows positions to be staffed on a temporary basis only and requires the written agreement of both the host and sponsoring organizations.

Another key staff member, my director of communications, was originally brought in as a specified term-employee through a position with the VCDS organization, pursuant to the exceptional provisions of the *Public Service Employment Act*.

My two remaining policy advisors had to be brought in as casual contracts for a maximum of three months less a day. These contracts were extended to the maximum time allowed and they are set to expire on February 8, 1999. An attempt is currently being made to bring these employees back on longer term positions. Work descriptions have been

¹⁵⁵ *Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at Appendix A; American Bar Association Administrative Law Section Ombudsman Committee Resolutions at page 11.

prepared and permission was sought from the Public Service Commission to allow us to directly name these two policy advisors for appointment to the longer term positions. This permission, however, was declined. We will be forced to post the positions and proceed through the public competition process, which includes advertising on the Internet and relying on the Public Service Commission to screen applicants and provide us with a list of candidates, who will be available to us to select from. This could potentially be a lengthy and time-consuming process. There is also the concern that my two current employees, despite being completely qualified for the positions, may not meet the technical requirements of the Commission or there may be other candidates who are given priority status by the Commission. Consequently, I could be deprived of the opportunity of hiring these valued and experienced employees, who have already demonstrated their skill, loyalty and commitment to my Office.

An additional concern for the hiring of my operational staff is one of time constraints. We have committed to the members of the DND/CF and the Canadian public to officially open the doors of my Office for regular business, as soon as my mandate is sanctioned. This commitment creates an additional pressure. Other than the attempts to retain my current temporary staff, no staffing action will take place until we are given the green light to proceed. If hiring is done pursuant to the Public Service Commission, positions will then have to be classified, work descriptions will need to be prepared, position numbers established and priority lists reviewed. Competitions through the Public Service Commission will take at a minimum several months to run. I have been advised that we may be required to look within the DND first and then inside the public service for qualified candidates.

I cannot emphasize too much the adverse impact on perceptions of my independence if I am forced to staff my Office solely from within the DND and/or the federal public service. Members of the DND/CF are looking to my Office to act as a third party outside of DND and government, to whom they can bring their problems. This perception of my Office will be shattered if the staff who will be dealing with these problems and working with me are limited to federal public servants, including DND employees.

During the drafting of this report, when the issue of my operational staff was raised within the DND, a directive emanated from within NDHQ that all of my Office's staff were to be hired on terms only and there were to be no permanent positions for my Office. This directive was issued without consultation with myself and prior to my report and recommendations even being completed.

The impact of this directive is to place distinct limitations on the type of staff who will be available for appointment to my Office. By restricting positions in my Office to contract terms only, ironically, many qualified persons from both the public service and the private sector will be eliminated as potential candidates. There will undoubtedly be persons who have a wealth of knowledge and experience, who will likely be unwilling to leave existing permanent positions for contract terms. Due to this direction, my ability to attract and maintain qualified personnel is greatly compromised. It is also unlikely that many persons, especially those in the private sector, could obtain permission to leave their present positions for three-year secondment terms. At least one very experienced potential candidate has expressed that they will not be prepared to leave their permanent position for a contract term.

There is also the concern that persons on secondment from the DND/CF or other federal government positions, may not appear or in fact may not be, completely independent and loyal solely to the Ombudsman's Office. Such persons clearly will be cognizant of how their performance within this Office will effect their positions when they return to their permanent government departments or CF posting. "As a member, there could be retribution when that person returns to the Canadian Forces and that member has dealt with thorny issues and contentions."¹⁵⁶ Obvious concerns about the potential for conflict of interest also exist. "This person could potentially be going back to the unit being investigated".¹⁵⁷ Putting serving members on a secondment or posting to the Office was also seen as a risk to

¹⁵⁶ Meeting with CAD "A" Staff, Winnipeg, September 14, 1998.

¹⁵⁷ Meeting with 2PPCLI Junior Ranks, Winnipeg, September 17, 1998.

confidentiality. “Putting serving members in your office on secondment is a problem because they can go back to the unit and can call people they know in the organization”.¹⁵⁸

This restriction on the hiring of staff directly prevents any long term continuity and consistency from being established within the Ombudsman’s Office. Although I was appointed as Ombudsman for a renewable three-year term, clearly, it is anticipated that the Office itself, as an institution, will survive my current term. By tying all staffs’ tenure to my current term, their knowledge and experience, which may eventually be required to assist in handing over the Office to a new Ombudsman, will be eliminated.

The importance of maintaining experienced investigators and avoiding high staff turnover was also emphasized by the Auditor General’s report on the CHRC, which highlighted concerns by stakeholders about the thoroughness of the investigations done by the Commission.¹⁵⁹ The Report noted that due to downsizing of regional offices and centralizing investigations, there had been a high turnover of investigative staff within the CHRC:

Because staff from the regions did not accept transfers to the National Capital Region, the Commission had to hire 14 new investigators. Since 1995, 15 investigators have left the unit that handles most complaints, six within a year of being hired. As a result, a series of investigators often work on the same case. The Commission told us it takes about a year for an investigator to become fully functional. Currently 14 of the 22 investigators in this unit have less than a year’s experience.¹⁶⁰

Any staffing restrictions will also have a direct impact on the confidence which members of the DND/CF will have in my organization. Members of the DND/CF are looking for a permanent body, which can develop continuity and a foundation of experience and knowledge to effectively deal with their problems. Concerns have already been expressed during my consultations about the duration of my three-year term and the potential that my Office may exist as a temporary, short-term mechanism only:

¹⁵⁸ Meeting with 4 Air Defence Regiment, 4 Wing Cold Lake, September 15, 1998.

¹⁵⁹ *Report of the Auditor General, supra*, note 139 at paragraph 10.58.

¹⁶⁰ *Ibid.*

- How long have you been hired for? Is this a permanent thing or a quick fix? (*Comments, Velika Kladusa, Bosnia, November 11, 1998*)
- We are more wondering how long the office will be set up for? (*Comments, Velika Kladusa, Bosnia, November 11, 1998*)
- You say that you are independent of the chain of command, are you politically independent. Can a new Minister throw you out? (*Meeting at Camp Holopina, Coralic, Bosnia, November 12, 1998*)
- Heard the Ombudsman's office is a temporary office. (*Meeting with 411 Squadron, 4 Wing Cold Lake, September 15, 1998*)
- Ombudsman should be here to stay. Should be a permanent position. (*Meeting with members at HMCS TORONTO, September 22, 1998*)

As the difficulties which I have already experienced in regard to staffing my Office demonstrate, outside restrictions and limits on the ability of an Ombudsman to select his staff and to set the terms and conditions of employment, are clearly unacceptable. They will directly interfere with the Ombudsman's degree of control over the staffing and the ultimate functioning of his office, including his ability to select the best suited and best qualified candidates for the positions in his office.

I therefore recommend that:

The Ombudsman should have the sole authority to appoint employees to his Office, outside of federal public service restrictions.

The Ombudsman should have the sole authority to set the terms and conditions of employment for all of the employees in his Office. Employees of the Ombudsman's Office should be answerable solely to the Ombudsman.

IMPLEMENTATION

Pursuant to section 8 of the *Public Service Employment Act*, except as provided in the *Act*, the Public Service Commission has the exclusive right and authority to make appointments to or within the public service. This appointment extends to persons for whose appointment there is no other authority in or under any other *Act of Parliament*. The *Act* also provides in section 11 that appointments shall be made from within the federal public

service, except where, in the opinion of the Commission it is not in the best interests of the Public Service to do so.

Furthermore, the Commission retains the power to revoke or overrule any appointment where persons lack the necessary qualifications for the job or the appointment would be in contravention of the terms and conditions of the *Act*. The Commission may also direct that an appointment not be made.¹⁶¹

The effect of the *Public Service Employment Act* would be to place numerous restrictions and limitations on my ability to select the best persons for my own staff. It would also restrict my hiring of staff to federal public servants, unless the Commission gives me express permission to hire from the private sector. As I have already emphasized, outside restrictions and limitations on the staff I may hire, (especially restrictions which will limit my staff to federal public servants) will call into question my Office's perceived independence and impartiality.

The *Public Service Employment Act* does recognize that there will be situations where the numerous technical restrictions of the *Act* should not apply. Mechanisms do exist within the *Act* to accord my Office the authority to hire its own employees, free from the *Act*'s restrictions. Specifically under section 8 of the *Act*, the Commission will not have the authority to appoint employees to my Office if I am given the authority to appoint my own employees "in or under any act of Parliament".¹⁶² Additionally, under section 41 of the *Act*, the Commission may, with the approval of the Governor in Council, exclude "a position or person or class of positions or persons in whole or in part" from the operation of any of the provisions of the *Act*. This power may be exercised where the Commission decides that it is "not practicable or in the best interests of the Public Service" to apply the *Act* or any of its provisions.¹⁶³

¹⁶¹ *Public Service Employment Act*, R.S.C. 1985, c. P-33 s. 6(2).

¹⁶² This wording implies that at a minimum a regulation under the *National Defence Act* would be required, to specifically provide the Ombudsman's office with the authority to appoint its own employees. A more in-depth legal analysis may however conclude that a legislative amendment would be required.

¹⁶³ An exemption under section 41 of the *Act* would require the support of the Governor in Council and the willingness on behalf of the Public Service Commission to enact such. Under section 41(2) of the *Act*, the

I therefore recommend that:

The Ombudsman should be provided with the specific authority to appoint employees to his Office, pursuant to an amendment to the regulations of the *National Defence Act*. In the alternative, that the Public Service Commission should be petitioned and the approval of the Governor in Council be sought, for an exemption under section 41 of the *Public Service Employment Act* for all positions established by and all appointments made by the Ombudsman. The exemption should be from all provisions of the *Act*, which would interfere with the Ombudsman's unfettered ability to select employees for his or her Office.

CIVILIAN VS. MILITARY STAFF

The importance of the selection of staff who work in the Ombudsman's Office and the impact which this has on the perceptions of neutrality and independence became very clear when views were sought from members of the DND/CF about where my Office's staff members should be hired from.

Many members of the DND/CF strongly vocalized the need for my Office to maintain its independence and be free from any military staff or personnel. Having military staff on board was seen by some as a direct threat to my Office's neutrality, independence and confidentiality. Revealingly, since my appointment in June 1998, many DND/CF members, who have called my Office to file a complaint, have asked the staff member who had answered the phone as to his or her background, indicating that if the staff member or the person who would ultimately have carriage of the matter was either a military member or former member, that they did not wish to continue the conversation. Concern was also expressed during the consultation that the use of military personnel would "taint" the Office and result in many of the same problems experienced in the redress of grievance system. It was clearly felt in many cases that the current system lacked neutrality and confidentiality:

Commission would retain the power (subject to approval by the Governor in Council) to go back and re-apply any provisions of the *Act* to any position or person who was previously excluded.

- One of the problems with our grievance system was because they had to appear unbiased... but everyone suspected they weren't. (*Meeting with 1 CAD Personnel, Winnipeg, September 16, 1998*)
- What confidentiality will there be? I would not grieve against my CO or XO or even my ex-CO or ex-XO, because they all know one another and can access information. (*Meeting on HMCS TORONTO, September 22, 1998*)

Many persons consulted expressed cynicism and disbelief at the ability of a military staff to assure confidentiality and neutrality in dealing with their problems. Many expressed strong advice that in setting up the office we “keep it clean from military personnel”:

- Sacrilege to have one member in uniform. Are you going to be seen as independent, if you have but one military person, where is the impartiality? (*Meeting at 1 CMBG, Edmonton, September 1, 1998*)
- No military persons investigating so we have an independent party, neutral looking at our issues. (*Visit and Tour 1 CER to View Sub-Unit and Region, Lunch with Brigade Officers, Land Forces West, Edmonton, September 1998*)
- Civilians can ask hard questions and not fear retribution. (*Meeting with Personnel, Edmonton Family Resource Centre, Land Forces West, Edmonton, September 2, 1998*)
- Use civilians, at least they'll do a better job than the guys who'll use the system against you. (*Meeting with Junior Ranks, MARLANT Forces, Halifax, October 26, 1998*)
- No military people whatsoever, they will talk. (*General Conversation with Soldiers, Attendance at 2 Royal Canadian Regiment Training Exercise, Combat Training Centre, Gagetown, October 29, 1998*)
- By the time someone calls you, they have lost confidence in the system. They won't want to talk to military personnel. (*Meeting with 2PPCLI Junior Ranks, Winnipeg, September 17, 1998*)
- Your staff cannot be a serving military; it would defeat the purpose. (*Meeting with HOTEF, 12 Wing Shearwater, October 27, 1998*)
- Better to have someone who knows nothing of military culture and learns. (*Meeting with Junior NCMs, 8 Wing Trenton, September 8, 1998*)
- If you have military answering the phone it will look like it is going through the chain of command. (*Working Lunch with Wing Commander and Wing Council, 8 Wing Trenton, September 8, 1998*)
- Guard not to be tainted with military person. (*Meeting with Wing Council, 8 Wing Trenton, September 8, 1998*)
- There should be no military, should be totally separate from the military. (*Meeting at Velika Kladusa, Bosnia, November 11, 1998*)

- If a member goes to the Ombudsman with a problem, tired of the “Good Old Boys System”, if he must deal with a senior rank or junior NCM, he will not feel safe. (*Meeting at Velika Kladusa, Bosnia, November 11, 1998*)
- Be all civilian. (*Tour of Bozanski and Petrovac, Bosnia, November 13, 1998*)
- If you put any Senior Officers on your staff, we will all be doomed. (*Luncheon, Geilenkirchen, Germany, November 6, 1998*)

On the other hand, it was clearly recognized by some that the Ombudsman's staff would require either their own military knowledge and experience, or they must have ready access to this. Military experience is required not only to understand technical terms and acronyms but also to understand military culture and place complaints about unfairness or injustice in this context:

- Need to have someone who does intake, who understands the military acronyms because it is hard enough to call and go through your case without having to explain the context and culture and give an overview of the military. (*Meeting with NCM Reserve MP, Edmonton, September 2, 1998*)
- Need someone to understand the Forces, we have our own terminology, culture, abbreviations, life-experiences – different approach is enhanced when you put the uniform on. (*Meeting Area Support Unit – Edmonton Transportation Coy, September 2, 1998*)
- You'll need to pick members who can look at policies not as black and white but as living types of documents. (*Meeting with 1 CAD Personnel, Winnipeg, September 16, 1998*)
- People in Ottawa don't necessarily know what we do. How can you understand if you're not military? (*Meeting at Officer's Mess, LFWATC, Wainwright, September 3, 1998*)
- Civilians don't have a clue about military culture. (*Meeting with Technical Staff, CFS Leitrim, November 25, 1998*)
- As a civilian you cannot grasp what it is to be military. (*Meeting with Junior Officers and Civilian Personnel, CFB Halifax, October 26, 1998*)
- I am leery that you won't understand our problems as you and your people have never served in the military. (*Comments, Velika Kladusa, Bosnia, November 11, 1998*)
- No problem, as long as they are paid by your office. (*Meeting with Wing Council, 8 Wing Trenton, September 8, 1998*)
- Need someone who knows precisely what it is we need to have to do our job properly. (*Meeting with Wing Council, 8 Wing Trenton, September 8, 1998*)
- How will your office understand military life? How will you understand how we work? If you come sail with us, go out in the field, eat with us, then you might understand! (*HMCS TORONTO, Main Cafeteria and Wardroom, September, 22, 1998*)

- Serving members – certainly! (*Meeting with Technical Staff, CFS Leitrim, November 25, 1998*)

Some of those consulted recommended the use of retired military personnel as staff members. “If you have military on board they would need to be retired and outside the chain of command”.¹⁶⁴ They suggested that the use of retired members would ensure that this component of the staff had “no axe to grind” and would have “no career ambitions which could be stifled”.¹⁶⁵ There was considerable concern expressed however that retired members would lack a current knowledge and understanding of today’s conditions and culture in the military. Some members believed that retired members “don’t know what is going on today” and “they would be out of touch”¹⁶⁶ with the issues. Many felt that the use of retired members would result in the Office being staffed by former higher-ups in the chain of command whose loyalty would not lie with the junior ranks. We were repeatedly warned to “stay away from the old boys network”.¹⁶⁷

- If you're gonna use retirees, don't put in a bunch of Generals – don't become a retirement home for Generals. (*General Comments, Working Lunch, Officers Mess, Halifax, October 26, 1998*)
- There should be no military in your organization. If you use military retired Officers, you will be seen as another creation of an organization for retired Generals. (*Meeting with Senior Officer, Land Forces West, Edmonton, September 1, 1998*)
- No retired people –all these guys look after each other. (*Meeting with Junior Ranks, MARLANT, Halifax, October 26, 1998*)
- Prevent people from retiring to a nice jammy job in Ottawa. (*Meeting with Junior Ranks, MARLANT, Halifax, October 26, 1998*)
- If you use retired Generals, it's gonna be an old boys club. (*Coffee and Meeting with Staff, Combat Training Centre, CFB Gagetown, October 29, 1998*)
- Not retired. If a guy gets out and is pissed off, can cause more harm than good. (*Meeting with Technical Staff, CFS Leitrim, November 25, 1998*)
- Not retired Colonels. (*Meeting with Commanding Officer, CFS Leitrim, November 25, 1998*)

¹⁶⁴ Meeting at Officer's Mess, LFWATC, Wainwright, September 3, 1998.

¹⁶⁵ Meeting with Senior Officer, Land Forces West Edmonton, September 1, 1998.

¹⁶⁶ Meeting with 15 AMS, 15 Wing, Moose Jaw, September 17, 1998.

¹⁶⁷ Meeting with Senior Officer, Land Forces West, Edmonton, September 1, 1998.

- Careful in using ex-military would be building perception of parallel military system. (*Meeting with Senior NCMs and Civilians, 8 Wing Trenton, September 8, 1998*)
- Ex-military have gone through, not sympathetic in their opinions. (*Meeting with Junior NCM's, 8 Wing Trenton, September 8, 1998*)
- Don't become a dumping ground for retired Generals. They didn't solve problems when they were in the system. (*Meeting with Administrative Staff, CFS Leitrim, November 25, 1998*)
- It's too easy for a Brigadier-General to resign and look for a job. He has management qualifications. He's a Mr. but he's still a General. (*Meeting with Administrative Staff, CFS Leitrim, November 25, 1998*)

A compromise solution which emerged during the consultation process and which serves the need to have military knowledge and experience, was to use military personnel in an arms-length advisory capacity. It was recommended by many that my Office should maintain a strictly civilian organization with input as honest brokers across the country from various ranks in the form of military advisors or an advisory board:

- Need experience of people who understand military but don't take the decision. Get perspective from people not emotionally involved. (*Meeting with members, Bihac, Bosnia, November 12, 1998*)
- You are correct in saying that we need a civilian agency, but you need a military person who understands what it's like to be out to sea for six months, and can advise you. (*Meeting with Junior Officers and Civilian Personnel, CFB Halifax, October 26, 1998*)
- I think you need outside perception to look in, need technical advisor, will be perception of some kind to have someone there – need technical advisors but do not defeat the purpose of why an Ombudsman was put in place. (*Meeting with Wing Council, 8 Wing Trenton, September 8, 1998*)
- Have military personnel on administrative level not decision level. (*Meeting with Senior NCMs and Civilians, 8 Wing Trenton, September 8, 1998*)
- With regard to staff, a combination of military and civilian or civilian with military advisors would be good. Because the military is very different from that of a civilian employer. (*Meeting with Operations Staff, CFS Leitrim, November 25, 1998*)
- Use military advisors but they must take off the uniform. (*Meeting with Community Association Representatives, Combat Training Centre, Gagetown, October 29, 1998*)

The general consensus was that such advisors must come from all ranks and should be selected by myself in a neutral fashion, rather than using persons who may be "hand-picked" because of the particular interests that they might represent. "Beware – if you have a

panel of military advisors they will choose who they will send.”¹⁶⁸ Such military advisors must also be persons who are capable of being independent and impartial in their tasks. Military advisors, it was felt, must also represent all three elements of the military – Army, Navy and Air Force, as they have different concerns and issues¹⁶⁹ and they must also come from all different ranks. This representation in military advisors should also include representatives who can give advice on the experiences and issues facing reservists and DND civilian personnel and should include representation from unions. Representation should also be sought from the chaplaincy and Military Family Resource Centres:

- Need somebody who takes care of the junior ranks, someone who takes care of the senior ranks and someone for officers. (*Meeting with Junior Ranks, MARLANT, Halifax, October 26, 1998*)
- A Colonel would look at problems from an officer’s standpoint, don’t want this. (*Meeting with Technical Staff, CFS Leitrim, November 25, 1998*)
- But I don’t want some schmucky General or Colonel. We’re little guys, if he’s gonna fight on our behalf, we should have direct input. (*Meeting with Technical Staff, CFS Leitrim, November 25, 1998*)
- Serving members would be ok if there is a mixture of ranks. (*Meeting with Technical Staff, CFS Leitrim, November 25, 1998*)
- The retired civilian employees would also want representation. (*Meeting with Military and Civilian members, Halifax, October 28, 1998*)
- If you have military advisors in office, not all officers and all ranks. (*Meeting with Junior NCMs, 8 Wing Trenton, September 8, 1998*)
- Reservists have different needs – will you have staff who is familiar with this issue. (*Working Lunch with Wing Commander and Wing Council, 8 Wing Trenton, September 8, 1998*)
- Need one of each rank and one of each element to get impartiality. It will be different from each region they come from. (*Tour of Bozanski and Petrovac, Bosnia, November 13, 1998*)
- Should have representatives from all three, Air, Army and Navy. (*Meeting with Junior NCMs, 8 Wing Trenton, September 8, 1998*)

¹⁶⁸ Meeting with 4 Air Defence Regiment, 4 Wing, Cold Lake, September 15, 1998.

¹⁶⁹ Meeting with 15 AMS, 15 Wing, Moose Jaw, September 17, 1998. See also: Meeting with Canadian Air Division, 1 Personnel, Winnipeg, September 16, 1998.

- You need representation from the three elements in your office. (*Meeting with Senior Officers and Senior Union Staff, CFB Halifax, October 26, 1998*)
- On top of military you also need to have civilian employees. The Military think in a box and don't see what's outside their organization. (*Meeting with Operations, CFS Leitrim, November 25, 1998*)
- Hire military spouses, they know what it's about. (*Meeting with Administrative Staff, CFS Leitrim, November 25, 1998*)

The use of military advisors would allow members of my Office to have access to the required knowledge and experience of military culture, in carrying out their tasks. At the same time, the ultimate decision-making power would be retained by myself, as the Ombudsman, and my civilian staff. I would be free to seek advice in a general fashion from advisors on the unique experiences of DND/CF members. Confidentiality and neutrality would still be preserved, as these members would not have access to my Office's files, including the identity of complainants and they would therefore not have direct input into my recommendations in a specific case. It was felt by many that this model would best serve to allay concerns about the lack of independence, neutrality and confidentiality that might ensue by having military personnel handle specific case files.

The need for both an actual and apparent independent, neutral and confidential office will have to be delicately balanced against the need for military knowledge and experience. This requirement also demonstrates the need for the Ombudsman to have absolute and complete freedom to appoint his staff members and/or to consult and hire advisory staff, where required.

I therefore recommend that:

The Ombudsman should have complete authority to determine the composition of his staff, including any current or former DND/CF representation on staff and the employment of military and civilian personnel as advisors.

The Ombudsman should, within one year of beginning his operations, establish a DND/CF advisory committee. The advisory committee will meet on a regular basis to provide the Ombudsman with advice on how to deal with issues within the context of the DND/CF. The representation of this committee should be determined by the Ombudsman, having regard to the need to ensure broad based representation within the constituency.

ACCESSING PROFESSIONAL SERVICES

From time to time, despite the knowledge and experience of the Ombudsman and his carefully selected staff, issues may arise that require a specialized knowledge or skill to resolve them. These issues may concern the day-to-day running of the Office or the handling of a specific complaint of unfairness or injustice. In such cases, I will be required to retain professional services of persons having the necessary knowledge or skill to deal with the problem. For example, Mr. David Bazay, CBC Ombudsman, has the ability to retain experts to validate his research and opinions and considers this to be an invaluable resource.¹⁷⁰ I should be free to contract the professional services of any persons having the technical or specialized knowledge of any matter, required to advise and assist me in carrying out my duties.¹⁷¹ I must also have the freedom to contract for the payment of such services, subject to the normal budgetary constraints of my Office, with provision for me to seek approval for special funding directly from you.

¹⁷⁰ Meeting with Mr. David Bazay, CBC Ombudsman, September 9, 1998.

¹⁷¹ *Ombudsman Legislative Resource Document: Occasional paper #65, supra*, note 150.

I therefore recommend that:

The Ombudsman should be free to contract for the professional services of persons having technical or specialized knowledge of any matters, required to advise and assist him or her in carrying out his/her duties. Such persons will be remunerated as contracted by the Ombudsman, subject to the budgetary constraints of his or her Office, with provision to seek approval for special funding for such contracts, directly from the Minister.

OTHER OMBUDSMEN MODELS

CIVILIAN

Provincial

The need for an Ombudsman to be completely independent and free to hire qualified and experienced staff who will be loyal solely to his or her office, has been recognized in the models established by provincial Ombudsmen offices.

The Ombudsman of British Columbia, for example, has the authority to appoint staff, as is necessary to perform the duties of the office. Appointments are done by the Ombudsman in accordance with the *Public Service Act* of British Columbia and the Ombudsman is designated as a deputy minister for the purposes of the *Act*. Ms. Dulcie McCallum, the British Columbia Ombudsman, comments that she is able to “do what I want, I can hire or fire.” The Ombudsman has complete control over the hiring for her office including whether competitions are held within or outside of the public service. The Ombudsman’s staff are treated as public servants for purposes of benefits but they are not subject to the provincial public service collective agreement. Ms. McCallum commented that this independence of the Ombudsman’s staff is essential given the highly confidential work they are involved in. “They can’t investigate an agency as intended if they come from there.” “They will come with a mentality of being easier on government and may not be as critical.” She commented that the Ombudsman cannot have any sign of partiality or hint of bias in his

or her staff, they must be “squeaky clean”.¹⁷² The British Columbia Ombudsman also has the power to make a special report to the Legislative Assembly where the amounts provided for the establishment of her office or the services provided by the Public Service Employees Relation Commission are inadequate.¹⁷³

The Ombudsman of New Brunswick has the unfettered power to appoint such assistants and employees as she deems necessary for the efficient carrying out of her functions under the *Act*.¹⁷⁴ She comments that “I hire who I want and so should you. It should read like most other *Ombudsman’s Acts* – you too should be exempt from the Public Service and hire freely who you want.”¹⁷⁵

The Ontario Ombudsman also has the power, subject to approval by the Lieutenant-Governor in Council, to hire such employees as is necessary for the efficient operation of her office and she may determine their salary, remuneration and terms and conditions of their employment. The way the office is set up, the Ombudsman employs her own employees.¹⁷⁶

Under the *Civil Servant Employee Act* of Nova Scotia, some of the Nova Scotia Ombudsman staff is unionized, while others are exempt. The Nova Scotia Ombudsman, Mr. Douglas Ruck, Q.C., recommended that anyone in my Office should not belong to any public service union due to conflict of interest – “What if there was a walk-out?”¹⁷⁷

¹⁷² Telephone interview with Ms. Dulcie McCallum, British Columbia Ombudsman, by a member of my staff, December 15, 1998.

¹⁷³ British Columbia's *Ombudsman Act*, *supra*, note 148, s. 8.

¹⁷⁴ New Brunswick's *Ombudsman Act*, *supra*, note 148, s. 8(1).

¹⁷⁵ Telephone interview with Ms. Ellen King, Ombudsman of New Brunswick, by a member of my staff, December 16, 1998.

¹⁷⁶ Ontario's *Ombudsman Act*, *supra*, note 148, s. 8(1). Meeting with Ontario Ombudsman Legal Staff, September 9, 1998.

¹⁷⁷ Meeting with Mr. Douglas Ruck, Q.C., Nova Scotia Ombudsman, October 28, 1998.

Federal

Office of the Information Commissioner

The Federal Information Commissioner has the authority to appoint his own employees in accordance with the *Public Service Employment Act*.¹⁷⁸ The Commissioner hires his own employees directly. The Director General of Reviews and Investigations for the Commissioner's office commented to my staff that "I don't just hire within the Public Service. I hire the best. I hire who I want. This is very important." He noted that "there are good people within the Public Service but need the flexibility to hire who you want".¹⁷⁹ He also stressed that the office relies on staff who are willing to make a long term commitment to the job, as they invest considerable time and financial resources in training investigators.

Office of the Correctional Investigator

Prior to the enactment of the *Corrections and Conditional Release Act*, the Correctional Investigator was limited to hiring staff for terms only. Under section 165(1) of the *Act*, the Correctional Investigator was specifically granted the authority to appoint his own employees under the *Public Service Employment Act*.¹⁸⁰ The office is treated as a separate employer for purposes of the *Public Service Employment Act* and thus can hire directly without going through the Commission. It was felt that this was of great benefit as the office was not restricted to hiring from the Public Service Commission lists and it saved much time and delay.¹⁸¹

MILITARY

Different Military Ombudsmen's offices have adapted different models of staffing, particularly, when dealing with the issue of balancing the need for independent civilian personnel against the need for military knowledge and experience.

¹⁷⁸ *Public Service Employment Act*, *supra*, note 161.

¹⁷⁹ Meeting with Mr. Dan Dupuis, Director General Investigations and Reviews, Office of the Information Commissioner of Canada, December 10, 1998.

¹⁸⁰ *Corrections and Conditional Release Act*, *supra*, note 72, s. 165(1).

¹⁸¹ Meeting with Mr. Ron Stewart, Correctional Investigator Canada, and Mr. Ed McIsaac, Executive Director, December 16, 1998.

Parliamentary Commissioner for the German Armed Forces

The German Parliamentary Commissioner for the Armed Forces has the authority to select her own staff and the composition of her staff is her prerogative.¹⁸² The office has a staff of approximately 60 persons, with approximately half of these employees consisting of higher-intermediate and higher service personnel, directly concerned with the review of matters brought to the attention of the Commissioner.¹⁸³ The Commissioner's staff are members of the German *Bundestag* Administration, within which they form a separate Directorate-General, entitled "Parliamentary Commissioner for the Armed Forces". This staff is under the sole supervision of the Parliamentary Commissioner with regard to their work and falls under the supervision of the Secretary – General of the German *Bundestag*, as the head of the *Bundestag* Administration, in regard to service regulations.¹⁸⁴ The Commissioner's staff includes administrative specialists, lawyers and investigators.¹⁸⁵

Australian Defence Force Ombudsman

The Australian DFO, which is part of the Commonwealth Ombudsman's office, is staffed by members of the Australian Public Service. There are no military personnel involved in reviews by the Defence Force Ombudsman.¹⁸⁶ The Commonwealth Ombudsman has approximately 80 employees in total, with approximately three investigators assigned to the Defence Force Ombudsman matters, as well as other areas.¹⁸⁷ The ADF complaints resolution agency, however has a larger unit with about 28-30 persons, including some reservists on staff.¹⁸⁸

¹⁸² Meeting with Lt.-Col. Schoof, Defence Attaché – Embassy of the Federal Republic of Germany, Ottawa, December 7, 1998.

¹⁸³ Karl Gleumes, *The Parliamentary Commissioner for the Armed Forces: Her Role in Exercising Parliamentary Control over the Federal Armed Forces and Processing Petitions from Service Personnel*, *supra*, note 89 at page 17.

¹⁸⁴ *Ibid.*

¹⁸⁵ Meeting with Lt.-Col. Schoof, Defence Attaché – Embassy of the Federal Republic of Germany, Ottawa, December 7, 1998.

¹⁸⁶ Correspondence to Lt.-Col. P. Pellicano, DPCR, NDHQ from Lt.-Col. P.R. Tyrell, Assistant Defence Advisor and Australian Army Senior Standardisation Representative, Ottawa, dated November 2, 1998.

¹⁸⁷ Telephone interview with Ms. Susan Matthews, Director of Investigations, Australian Commonwealth Ombudsman, by a member of my staff, December 16, 1998.

¹⁸⁸ *Ibid.*

Inspector General for the Netherlands

The total strength of the Inspector General's staff is 29 persons, including support personnel. The numbers of military personnel and civilians are 16 and 13, respectively. The 14 staff positions are divided among the Inspector General, the Chief of Staff, 11 staff officers and the Deputy Chief of Staff. The positions of Inspector General and Chief of staff rotate among the three services; the remaining officers include two commanders from the Royal Navy, six Lieutenant Colonels and one Major from the Royal Army, two wing-commanders from the Royal Air Force and one Ombudsman for the civilians, employed by the Ministry of Defense.¹⁸⁹

Israeli Defence Force Soldiers' Complaints Commissioner

The Commissioner's office has a staff of approximately fifty. Half of his staff are lawyers and the other half consists of field investigators, including both senior and junior staff members. The posting to the Ombudsman's office is for three to four years. Investigators consist of military personnel, with senior investigators being comprised of Lieutenant Colonels and Junior Investigators being comprised of Lieutenants. All personnel consists of officers. There are no soldiers, with the exception of one junior investigator who is a lawyer.¹⁹⁰

INDEPENDENT LEGAL ADVICE

PRINCIPLE

An **independent** Ombudsman's Office requires an **independent** legal advisor. Given the many different and complex cases which my Office will be expected to review, ongoing legal advice will be necessary on a variety of issues. My counsel will play an important role as an advisor on specific cases, as well as on issues dealing with the overall set-up and operations of the Office. Examples of the types of issues on which I will require ongoing legal advice include: issues of jurisdiction, legal liability, the lawful exercise of my powers of investigation, the legality of specific practices or policies which are the source of complaint and access to information and privacy matters, as they apply to the unique context of my

¹⁸⁹ *The Function of the Inspector General of the Dutch Armed Forces, supra*, note 109 at pages 5-6.

Office. Given the important role that my legal counsel will play, it is imperative that this legal advice is available to me on an ongoing basis from a strictly independent and confidential source with no potential for any apparent or real conflict of interest.

Therefore I recommend that:

The Ombudsman should be free to appoint an Independent Legal Advisor, to provide legal advice to the Ombudsman on all matters of law pertaining to the Office.

IMPLEMENTATION

Traditionally legal advice has been provided to the DND/CF from the Judge Advocate General's (JAG) Office and by agreement through the Federal Department of Justice Legal Operations Division. These offices have the responsibility of providing legal advice to the Minister of National Defence, the Deputy Minister and the CDS on military law and public law issues.

The JAG has, over time, served as legal advisor to the Governor General, the Minister of National Defence and the Department of National Defence on all matters of military law. Where legal issues have been broader than military law or have involved interests beyond the department and Canadian forces, the JAG's duties have been carried out in conjunction with the Department of Justice.¹⁹¹ The "JAG gives legal advice to DND/CF on everything from soup to nuts".¹⁹²

Because of the many duties and functions which the JAG has served within the DND/CF, there have been inevitable instances arising in which the JAG has appeared to be or was felt to be in a conflict of interest. Many of these situations have arisen where the office of the JAG has attempted to serve different departments and interests within the DND/CF, which at times had conflicting interests. As a result of the Somalia Commission

¹⁹⁰ Meeting with Brig.-Gen. (ret'd) Uzi Levizur, I.D.F. Soldier's Complaints Commissioner, November 9, 1998.

¹⁹¹ Amendments to the *National Defence Act*, Issue Paper No. 2: *Key Actors in the Military Justice System*, Department of National Defence, 1997.

¹⁹² Meeting with JAG, August 13, 1998.

Inquiry, this concern was focused on the involvement of the JAG in various roles related to military justice and conflicts which arose in this context.¹⁹³ The Somalia Commission concluded that the duties and functions of JAG should be clearly defined and delineated in amendments to the *National Defence Act*:

It is proposed that the role and functions of the Judge Advocate General (JAG) be set out in statute in order to eliminate potential conflicts of interest and to strengthen the institutional independence of its constituent parts[...]¹⁹⁴

The government responded to these recommendations with new amendments to the *National Defence Act* in the area of military justice. These amendments stress the need for clear, separate and independent roles for the JAG:

Although the *National Defence Act* established the positions of key authorities in the military justice system, clarification and clear separation of the roles of these authorities is required. This reform will strengthen the system by improving its transparency, accountability and perception of impartiality.¹⁹⁵

The government has thus clearly recognized the unlimited potential for conflict of interest when an office such as JAG attempts to serve the multitude of different interests within a government department such as the DND. This potential for conflict would be exacerbated greatly if the JAG were asked to advise and/or represent the interests of an outside third party such as my Office, while at the same time remaining loyal to and advising the DM and CDS and other interests within the DND organization.¹⁹⁶ We must avoid turning back the clock and repeating history, just when the legislator is attempting to fix the problem of conflict of interest in relation to the JAG.

¹⁹³ Meeting with Me Simon Noël, Q.C., September 22, 1998.

¹⁹⁴ *A Commitment to Change: Report on the Recommendations of the Somalia Commission of Inquiry*, *supra*, note 39 at page 105.

¹⁹⁵ *Issue Paper No. 2, Key Actors in the Military Justice System*, *supra*, note 191 at page 4. See also: Bill C-25, which received Royal Assent on December 10, 1998.

¹⁹⁶ The Honourable Mr. Justice Gilles Lévesque commented on JAG's conflict of interest in providing advice to the Ombudsman and the need for counsel outside of DND. (Meeting with The Honourable Mr. Justice Gilles Lévesque, September 30, 1998). See also: Notes of Meeting with Me Simon Noël, Q.C., September 22, 1998. Both The Honourable Mr. Justice Lévesque and Me Noël commented on the need for the Ombudsman's counsel to be outside of JAG because of conflict of interest.

The Canadian Bar Association (CBA) Code of Professional Conduct specifically provides that:

[t]he lawyer shall not advise or represent both sides of a dispute, and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.¹⁹⁷

The CBA defines conflict of interest and provides the rationale for the rule, in its guiding principles:

A conflicting interest is one which would be likely to affect adversely the lawyer's judgement on behalf of or loyalty to a client or prospective client, or which the lawyer might be prompted to prefer to the interests of a client or prospective client.¹⁹⁸

The reason for the rule is self-evident. A lawyer owes to his client his undivided loyalty. The client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from compromising influences:

Conflicting interests include, but are not limited to the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.¹⁹⁹

The Supreme Court of Canada has also adopted a high standard for counsel when faced with conflict of interest situations:

In dealing with the question of use of confidential information, we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton J. in *Rakusen*, "that is a thing which you cannot prove". (at page 841) I would add or "disprove". If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonable informed person would be satisfied that no use of confidential information would occur. That in my

¹⁹⁷ *Canadian Bar Association Code of Professional Conduct*, August 1987, Chapter V at page 17. It should be noted that each of the respective provinces has a provincial equivalent of this standard, for example see, *The Law Society of Upper Canada Rules of Professional Conduct*, Rule 5.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.* Chapter V, Guiding Principles 1 through 3 at page 17. See also: *The Law Society of Upper Canada Rules of Professional Conduct*, Rule 5 which adds the following to Guiding Principle #1, "or which the lawyer might be prompted to prefer to the interests of a client or prospective client."

opinion, is the overriding policy that applies and must inform the court in answering the question.²⁰⁰

One of the greatest areas for the appearance of partiality or lack of independence, is in the area of the JAG office's role in the military justice system. A recent example, can be seen in the decision of the Court Martial Appeal Court of Canada, in *R. v. Lauzon* rendered September 18, 1998, which dealt with a constitutional challenge to the independence of Military Court Martial Judges. The court in the *Lauzon* case concluded that:

[t]he organizational and institutional relationship among the Minister, the Judge Advocate General and the members of his or her Office who represent the Executive, and the military trial judges who hear the Department's cases does not in our view, afford sufficient guarantees of institutional impartiality and independence. A reasonable person who became aware of the prevailing state of the law and the embarrassingly close relationship which exists between the Executive and the judiciary could only conclude, or at least would be justified in perceiving and believing, that the Presidents of the Standing Court Martial are not free from pressure by the Executive at the institutional level. In other words, such a person could reasonably conclude that the military trial judges act through the Executive, with the Executive and for the Executive [...]

[...] It is therefore almost inevitable that relations between the Executive and the judiciary will become confused, if we remember that military trial judges, like legal officers, also belong to the Office of the Judge Advocate General who argues cases before them [...]²⁰¹

Under Bill C-25, the JAG is delegated the superintendence of the military justice system. The JAG will be officially responsible for undertaking regular reviews of the military justice system and must report directly to the Minister on the administration of military justice in the Canadian forces.²⁰² My Office will be asked to look into matters of alleged injustice or unfairness in the context of the military justice system. This role of the Ombudsman's Office, as a general oversight and review mechanism for the military justice system, has already been recognized by the Department:

²⁰⁰ *MacDonald Estate v. Martin*, [1990] S.C.J. 41, per Sopinka J. at page 16.

²⁰¹ *R. v. Lauzon*, [1998] C.M.A.J. 5.

²⁰² Amendments to the *National Defence Act*, Bill C-25, given Royal Assent December 10, 1998, s. 9.2 and s. 9.3.

In addition, an office of the Ombudsperson is being set up outside of the chain of command to provide information, advice and guidance to military members who have **complaints related to military justice** (or any other work related matter) which they believe cannot be dealt with through existing channels.²⁰³ (Emphasis added).

In such cases, my Office should not be forced to seek legal counsel from the same office which is directly accountable to the Minister for the military justice system's administration.

Under the new amendments, the offices of the Director of Military Prosecutions and the Director of Defence Counsel Services, although separate offices, both come under the general supervision of the JAG.²⁰⁴ The JAG has the power to issue general instructions or guidelines in writing in respect of defence counsel services, as well as in respect of prosecutions.²⁰⁵ With respect to prosecutions, the JAG also retains the power to issue instructions or guidelines in writing in respect of particular prosecutions, with copies to be made public unless it is not within the interests of military justice. Copies of such guidelines are also to be provided to the Minister.

There is a clear and obvious potential for conflict of interest where my Office is asked to look into alleged miscarriages of justice or unfairness in the context of a military prosecution or services provided in the defence of such a prosecution. Where legal advice is necessary, my Office should not be forced to turn to the same office that is responsible for general supervision of the departments, where the alleged miscarriage of justice or unfairness occurred. Furthermore, there is also the potential that the alleged miscarriage of justice or unfairness in question may have flowed from a guideline or instruction issued directly from the office of the JAG. This would result in one of the clearest cases of conflict of interest.

An additional problem with relying on the JAG for independent counsel, stems not just from the potential for conflict in any individual case but also from the direct adverse

²⁰³ Amendments to the *National Defence Act*, Bill C-25, *Background and Amendment Highlights: Issue Paper No. 8: Oversight and Review* at page 2.

²⁰⁴ Amendments to the *National Defence Act*, Bill C-25, given Royal Assent December 10, 1998, s. 165.17 and s. 249.2.

impact which this would have on perceptions of my Office's independence and neutrality. It was clear from our consultations, that members of the CF directly associate the office of the JAG with representing the interests of the DND/CF.

In addition to the JAG, the position of the DND/CF legal advisor was established by a preliminary letter of service agreement dated January 9, 1998 and signed by the CDS, the DM-DND and the DM Justice.

This agreement provides that all legal services required by DND/CF will be provided by "a combined legal services organization" consisting of two parts: the Office of the JAG and the office of the DND/CF Legal Advisor (DND/CF LA).²⁰⁶ The DND/CF LA is appointed jointly by the CDS and the DM's of National Defence and Justice and is currently a DOJ legal advisor.²⁰⁷ The DND/CF LA consists of two divisions led by Deputy Legal Advisors of equivalent rank and status. The head of one division is a legal officer of the rank of Colonel and the head of the other is a DOJ legal advisor.²⁰⁸

The Departmental Legal Services Unit (DLSU) was set up to provide legal services to DND on public law issues including labor law, administrative law and the Canadian Charter of Rights and Freedoms. Legal subject areas covered by the DND/CF Legal Advisor include: materiel (including procurement and contracting, real property and environmental law), human rights, access to information and privacy, and labour law issues relating to civilian personnel, including pensions and finance.²⁰⁹

The DLSU for the DND/CF is structured to work together with JAG for the provision of legal services to the DND/CF. The agreement for the provision of legal services provides that DLSU members shall have similar direct access to DND/CF clients as the

²⁰⁵ *Ibid.*

²⁰⁶ Preliminary Letter of Agreement Between the Department of Justice (DOJ) and the Department of National Defence (DND) and the Canadian Forces (CF) Regarding the Provision of Legal Services, signed January 9, 1998.

²⁰⁷ *Ibid.* at page 3, para. 9.

²⁰⁸ DND/CF Legal Advisor and JAG Organizational Charts, Provided by Me Yves Côté, Q.C., DND/CF Legal Advisor, November 3, 1998.

²⁰⁹ Preliminary Letter of Agreement, *supra*, note 206, at pages 2-3, para. 6, and note 3.

Deputy LA/CF and DND, Deputy Judge Advocate General and Canadian Forces Legal officers and that the DLSU will be co-located with the office of the JAG.²¹⁰ The agreement also stipulates that Justice Legal Advisors may be assigned to Directorates within the office of JAG or under the military Deputy Legal Advisor, although they will still be considered part of the DLSU. Similarly, legal officers from JAG may be assigned to Directorates within the office of the DND/CF LA, although they will still be considered part of the office of JAG.

Due to its mandate to provide legal services to the DND/CF on public law issues, there is a real potential for actual and apparent conflict of interest if the DND/CF LA were also required to provide ongoing legal services to my Office. One of the purposes of the insertion of a DOJ legal services unit into the DND was to ensure that the department received legal advice on public law issues, which was consistent with that received by all other government departments.²¹¹ Given that my mandate extends to systemic problems, which may originate from within the DND or outside the organization but still within government, I will be asked to review policies and decisions made by government officials both within and outside of DND (as they are applied to the DND/CF members). It is a fundamental conflict that I must receive my legal advice from the same advisors who are serving the government departments, involved in the cases I may be dealing with or which may be impacted by my recommendations.

There is the potential for a conflict of interest in all of the areas in which the DND/CF LA provides legal advice to the DND, including human rights, access to information and privacy and civilian labour issues. All of these areas come within the mandate of my Office and are areas in which complaints are likely to be received. In fact because my Office is mandated to deal with any type of complaint of individual or systemic injustice or unfairness, the potential for conflict is unlimited.

²¹⁰ *Ibid.* at page 5, para. 14, note 2.

²¹¹ Meeting with Me Yves Côté, Q.C., DND/CF Legal Advisor, November 3, 1998.

Much of the same logic and reasoning, which dictates that the JAG should not act as legal counsel to my Office, also applies to the DND/CF Legal Advisor. The DND/CF Legal Advisor performs his responsibilities as a representative of the Minister of Justice and the Attorney General of Canada within the DND/CF and members of the DLSU remain employees of the DOJ. However, in the eyes of potential complainants, the DND/CF Legal Advisor will be seen to be a part of the DND and associated directly with JAG. This is especially the case when one considers that these two units are expected to work together hand and hand and will have an intermingling of members in each other's departments. The office of the DND/CF LA is in fact located within DND offices in the Constitution Building in Ottawa, only furthering the perception, however incorrect, that this office exists as part of the DND organization.

Although members of the DLSU within DND/CF are not within the chain of command, they are employees of the federal government, DOJ. The DND/CF Legal Advisor reports directly to the DM DOJ. As employees of the federal government, members of the DLSU will be viewed as public servants and as such they will not be considered completely neutral and independent. Members of my staff and especially, my legal advisors must be seen to be as completely impartial and independent as myself. Perceptions are crucial, for if my Office is not perceived to be fair and impartial, persons will not turn to it for help. Being required to seek legal advice from the federal public service, in fact will undermine my ability to present myself as a third party who is truly outside of and independent from government. Quite simply, the Ombudsman is supposed to provide a place to turn which is outside of the normal government bureaucracy. Consequently, the legal advice, which I rely on, must also come from outside of government.

The JAG and the DND/CF LA have the combined responsibility of providing legal advice to the DND/CF on legal matters concerning military law and public law, including civilian labor issues. Their combined services are meant to serve the interests of the DND/CF and the Government of Canada as a whole. My Office is meant to serve as an outside third party, who must consider the interests of all parties involved, including the individual complainant and the DND/CF and the government as a whole, and make

recommendations based on fairness. This will require balancing all of the interests involved in a particular issue. In order for me to successfully achieve this, my investigators and my legal advisors must be completely independent and free to act only in the interests of fairness. This independence also requires that I have absolute control over who is responsible for providing legal advice and services to my Office.

I therefore recommend that:

The Ombudsman's Legal Advisor should be from outside of the DND/CF and the federal public service and independent of the combined legal services organization, composed of the office of JAG and the DOJ/DLSU.

Although for the reasons stated above, the office of the JAG and the DOJ/DLSU should not be in-house independent counsel for the Office of the Ombudsman, I do recognize that they can be a valuable source of legal information and experience, particularly on the application of laws in the DND/CF context. Consequently, although it is imperative that my Office retain its own independent legal advisor, the services of the JAG and the DOJ/DLSU will still be used by my Office as a resource on a consultative basis.

I therefore recommend that:

The Ombudsman should have access to the legal staff of the JAG and DOJ/DLSU to provide information and expertise on specific matters.

OTHER OMBUDSMEN MODELS

The recognized need for and importance of independent legal advice can be seen upon examination of a number of other Ombudsmen's models which have in-house legal counsel.

The Ombudsman Association (TOA) advises Organizational Ombudsmen that they should emphasize the desirability to have independent counsel outside of the organization which they represent. They advise that both the Ombudsman and his employer, must recognize that the needs of the Ombudsman will not always be the same as those of corporate counsel (or other counsel who represent the organization which the Ombudsman works within).²¹²

CIVILIAN

Provincial

The Alberta Ombudsman has its own in-house counsel. The report of the Alberta Ombudsman's office refers to some of the work which its counsel embarked on by consulting with the Department of Labour and other government officials to clarify the role of the Ombudsman within the new *Health Professions Act* of Alberta.²¹³ The Alberta Ombudsman placed great emphasis on the importance of his in-house counsel, "I rely on her implicitly".²¹⁴ It was also stressed that "you need someone affiliated with the office", as the legalities and interpretation of the law can be complex, especially when jurisdictional issues arise.²¹⁵

The Ontario Ombudsman's report refers to her own "Policy, Legal Research and Communications" department, which includes two legal advisors, an analyst/investigator and a policy advisor and research assistant.²¹⁶ The Ontario Ombudsman can also contract an outside independent counsel to provide advice on any issue that may arise.²¹⁷ The Nova Scotia Ombudsman uses external counsel as its source of legal advice.²¹⁸ It should be noted that the Québec Ombudsman does not have a legal department, however 90 percent of their staff has legal training (lawyers and paralegals).²¹⁹

²¹² Mr. Wendall Jones, Ombudsman, Sandia National Laboratories, The Ombudsman Association (TOA) Course, Ombuds 101, *Presentation on Confidentiality*, October 21-23, 1998.

²¹³ Office of the Ombudsman of Alberta, *31st Annual Report*, *supra*, note 145 at page 5.

²¹⁴ Interview with Mr. Scott Sutton, Alberta Ombudsman, September 4, 1998.

²¹⁵ *Ibid.*

²¹⁶ Ontario Ombudsman, *Annual Report 1997-98*, *supra*, note 145.

²¹⁷ Meeting with Ontario Ombudsman Legal Staff, September 9, 1998.

²¹⁸ Meeting with Mr. Douglas Ruck, Q.C., Nova Scotia Ombudsman, October 28, 1998.

²¹⁹ Meeting with Me Daniel Jacoby, Q.C., Protecteur du citoyen du Québec, August 19, 1998.

Federal

Office of the Information Commissioner

The office of the Information Commissioner has its own internal counsel. The Director General of Reviews and Investigations for the office, commented to my staff that “this is a must”. Where the office seeks advice on issues requiring special expertise, they contract out to outside independent counsel.²²⁰

Office of the Official Languages Commissioner

The Commissioner has three independent in-house counsel, which are not part of a Department of Justice Legal Services Unit. This need for independent counsel is felt to be important because the “perception of impartiality is crucial”. Further, counsel to the Information Commissioner requires a particular expertise, knowledge and skill in relation to language issues.²²¹

Office of the Correctional Investigator

The Correctional Investigator’s office has in-house counsel in an LA-1 position who deals with daily issues and who also functions part-time as an investigator. The Correctional Investigator’s office does not rely on Department of Justice counsel because the Department provides advice to Correctional Services Canada and it is recognized that this would be a direct conflict of interest. If the office requires representation in Federal Court or before a Commission of Inquiry (as was the case during the Arbour Commission), independent private counsel is retained. Based on his considerable experience of more than twenty years in the Ombudsman field, the Correctional Investigator commented that my Office would likely need to have independent in-house counsel, hired from outside.²²²

²²⁰ Meeting with Mr. Dan Dupuis, Director General Investigations and Reviews, Office of the Information Commissioner of Canada, December 10, 1998.

²²¹ Meeting with Mr. Gilbert Langelier, Assistant Director General, Investigations Branch Office of the Commissioner of Official Languages, August 18, 1998.

²²² Meeting with Mr. Ron Stewart, Correctional Investigator of Canada, and Mr. Ed McIsaac, Executive Director, December 16, 1998.

MILITARY

Parliamentary Commissioner for the German Armed Forces

The German Parliamentary Commissioner has lawyers on her staff to deal with jurisdictional issues, as well as administrative specialists.²²³

Australian Defence Force Ombudsman

The Ombudsman's office has a Director Policy who provides legal advice, although they sometimes seek outside assistance from the Australian Government Solicitor and the Attorney General's Department.²²⁴

Inspector General for the Netherlands

The Inspector General for the Netherlands does not have legal counsel on staff. However, they have noted that having such representation would clearly be desirable; "having legal representation has always been our big fight".²²⁵

Israeli Defence Force Soldiers' Complaints Commissioner

The IDF Soldiers' Complaint Commissioner has a unique system in which independent legal advice is provided to the Ombudsman and on a continual basis directly to investigators, as they proceed with their investigation of each complaint. The Commission has two departments – inquiry and legal. The legal department consists of eight lawyers and the inquiry department consists of nine investigators – four senior and five junior.

Complaints are reviewed by the legal department upon receipt and are assessed as to what type of investigation will be required. The investigation is carried out by one of the senior or junior investigators in the inquiries department in consultation with an assigned counsel in the legal department. If there is a legal problem, the file is transferred over to the legal department. When the investigation is complete, the investigator makes

²²³ Meeting with Lt.-Kol. Schoof, Defence Attaché – Embassy of the Federal Republic of Germany, Ottawa, December 7, 1998.

²²⁴ Telephone interview with Ms. Susan Matthews, Director of Investigations, Commonwealth Ombudsman, Australia, December 15, 1998.

recommendations based on his findings and then the file is reviewed by counsel in the legal department who verifies the legal aspects of the case. It is only after the report on the file is reviewed by the head of the legal department, that it is forwarded to the Commissioner.

The Commission established its own legal counsel department in 1972. The IDF also has a Judge Advocate General system and the Soldier's Complaints Commissioner refers some cases to the JAG office. The Soldier's Complaints Commissioner however is separate from the IDF JAG and does not rely on the JAG for legal advice.²²⁶

DELEGATION OF POWERS

It is important for the smooth functioning of the office that the Ombudsman have the authority to delegate to any member of his or her staff the powers, duties and functions of the Ombudsman, except the power to delegate and the duty to submit an annual report.

I therefore recommend that:

The Ombudsman should have the sole authority to delegate to a member of the Ombudsman's Office any of the Ombudsman's powers, duties or functions, except the power to delegate and the duty to submit an Annual Report.

IMMUNITIES

PRINCIPLE

Complete independence and impartiality require immunity from review of my decisions and recommendations and immunity from civil or other proceedings against myself and my staff. Because of the importance of my independence, these characteristics of the Office should be specifically recognized in a legislative framework, establishing the Office, for example, through regulation to the *National Defence Act*. There are limits however to the extent to which a regulation will be able to ensure immunity from review or immunity from

²²⁵ Telephone interview with Lt.-Kol. Plugge from the Office of the Inspector General of the Netherlands, by a member of my staff, November 6, 1998.

²²⁶ Meeting with Brig.-Gen. (ret'd) Uzi Levztur, I.D.F. Soldier's Complaints Commissioner, November 9, 1998.

civil or criminal liability. Regulations would serve to ensure that my decisions and recommendations are not subject to challenge within the DND/CF organization but would likely be insufficient to prevent challenge from outside of the DND/CF through court proceedings.

IMMUNITY FROM REVIEW

I report directly to you as the Minister of National Defence. I do not report or answer to anyone within the chain of command. As such my Office will act as an avenue of “last resort” for those members of DND/CF who feel they have been subject to unjust or unfair treatment. My decisions, findings and reports must be considered final. They must not be subject to review or question by any authority,²²⁷ except by yourself, as the Minister of National Defence. Because the Ombudsman has no enforcement power and his reports are expressions of opinion, there should be no basis for judicial review of the Ombudsman’s work.²²⁸ “Since no one receives anything by right from the Ombudsman and since the Ombudsman cannot issue a binding order to any agency, judicial review would serve mainly to harass and delay the Ombudsman.”²²⁹

Issues of jurisdiction will be dealt with by clear statements contained in my Office’s enabling authority. Where jurisdiction is in question, judicial review may be appropriate, if no other resolution can be found.

I therefore recommend that:

The Ombudsman’s decisions, recommendations and reports should be final and not subject to being challenged, reviewed, quashed or called into question by any authority or in any court.

²²⁷ See: *Corrections and Conditional Release Act*, *supra*, note 72, s. 187; British Columbia’s *Ombudsman Act*, *supra*, note 148 s. 28; New Brunswick’s *Ombudsman Act*, *supra*, note 148 s. 23; Ontario’s *Ombudsman Act*, *supra*, note 148 s. 23; Alberta’s *Ombudsman Act*, *supra*, note 148, s. 22 and s. 23; and Alberta’s Ombudsman, *31st Annual Report* *supra*, note 145 at page 6.

²²⁸ *Ombudsman Legislative Resource Document: Occasional paper #65*, *supra*, note 150.

²²⁹ *Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at page 4.

IMMUNITY FROM CIVIL AND CRIMINAL LIABILITY

It has been noted that “the Ombudsman is an attractive target for the people criticized or served”.²³⁰ The Ombudsman and his staff must be protected from civil or criminal proceedings being brought against them for any acts, which are performed in good faith, in the course of carrying out their duties. This protection is specifically afforded to federal bodies, which perform Ombudsman functions, as well as all provincial Ombudsmen, in their enabling legislation.²³¹ This immunity is essential to protect the Ombudsman and his staff or anyone else acting under the Ombudsman’s authority, from harassment when dealing with controversial issues or making a finding seen as favorable to an unpopular position.²³²

Injustice and unfairness are often matters of judgement which present as “gray” rather than “black and white”. In order to be effective in resolving such matters, it will be necessary for my Office to become involved in controversial issues, where there are often two or more sides being taken. In many cases, different persons will have stakes in particular outcomes and a variety of different interests may come into play. To be truly independent and neutral, both my staff and I must be free from pressure to take any side on a particular issue. This includes the freedom to conduct ourselves in all matters without fear of potential lawsuit or other proceeding being brought against us by persons who disagree with an approach that has been taken or a finding or recommendation which I have made.

Immunity from civil proceedings will also prevent my staff from being diverted from their tasks by having to defend themselves in complex and time-consuming lawsuits. Immunity allows the Ombudsman “to focus resources on receiving and investigating complaints rather than defending suits.”²³³ My Office will be expected to become involved in many highly litigious matters, such as cases of alleged sexual harassment or sexual assault. I

²³⁰ *Ibid.*

²³¹ See: *Access to Information Act*, R.S.C. 1985, c.A-1 s. 66; *Privacy Act*, R.S.C. 1985 c.P-2, s. 74; *Corrections and Conditional Release Act*, *supra*, note 72, s. 188 and s. 190; *Alberta's Ombudsman Act*, *supra*, note 148 s. 24(1); *British Columbia's Ombudsman Act*, *supra*, note 148, s. 29(1); *New Brunswick's Ombudsman Act*, *supra*, note 148 s. 24(1); *Ontario's Ombudsman Act*, *supra*, note 148, s. 24(1). See also: *Recommendations of the “Report of the Committee of the Concept of Ombudsman”* and *Recommendations of the American Bar Association Administrative Law Section*, Ombudsman Committee (recommendation #12), Published in *Appendix A of Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at page 12.

²³² *Ombudsman Legislative Resource Document*, *supra*, note 150.

²³³ *Essential Characteristics of a Classical Ombudsman*, *supra*, note 10 at page 4.

must be free to deal with such cases and make recommendations without fear of being drawn into potential time-consuming and costly litigation.

Civil litigation and defending lawsuits is not only extremely time-consuming but also extremely costly. If sufficient protection from potential lawsuit does not exist for my Office, DND/CF will be forced to bear the high costs of defending such suits. Given the unique position of my Office as being at arms-length from the DND/CF, outside legal representation would be required, at considerable expense to taxpayers. Without sufficient protection against civil liability, provision must also be made to cover the high cost of indemnifying the employees of my Office, including myself as the Ombudsman, against any potential liability for acts done in good faith during the course of carrying out our duties.

One of the Ombudsman's most valuable and powerful tools to effect change, is the power of public comment.²³⁴ In many cases, I expect that it will be unnecessary to resort to this power, as issues will be resolved informally through my powers of conciliation and persuasion. In some instances, however, it will be necessary for me to bring matters to the attention of persons higher up in government and ultimately yourself, as the Minister of National Defence. As one who is responsible for highlighting injustice and unfairness and seeking change, I have a duty to do what I can to persuade those in power that my recommendations to achieve fairness should be followed. Where this persuasion has proved unsuccessful, in the pursuit of fairness, I will be required to bring matters to the attention of the public in specific cases. In such cases, my independence requires that I be free to comment publicly on matters without fear of consequence. This freedom requires that my Office be immune from any threat of consequence through a potential libel or slander suit or any other civil action.

²³⁴ The issues of public reporting and public comment are dealt with in detail in Chapter 4 under sub-heading "Reporting" at page 177 of this Report.

I therefore recommend that:

The *National Defence Act* should be amended to specifically provide that the Ombudsman and persons acting under his direction are immune from criminal or civil proceedings for anything done, reported or said in good faith while carrying out their duties and that for the purposes of any law relating to libel or slander, anything said or any information supplied or any document produced in good faith in the course of an investigation by the Ombudsman or his staff or any report made in good faith by the Ombudsman and any fair and accurate account of the report, made in good faith in a newspaper or any other publication or in a broadcast, is privileged.

In the alternative, a regulation should be passed pursuant to the *National Defence Act* to specifically provide that the Ombudsman and persons acting under his direction are immune from criminal or civil proceedings for anything done, reported or said in good faith while carrying out their duties and that for the purposes of any law relating to libel or slander, anything said or any information supplied or any document produced in good faith in the course of an investigation by the Ombudsman or his staff or any report made in good faith by the Ombudsman and any fair and accurate account of the report, made in good faith in a newspaper or any other publication or in a broadcast, is privileged.

DND should fund outside counsel to represent any member of the Ombudsman's office, named in a civil proceeding. In the absence of immunity, the DND will also be financially responsible for indemnifying all members of the Ombudsman's office for civil liabilities incurred while acting in good faith, in the carrying out of their duties.

CONFIDENTIALITY

PRINCIPLE

GENERAL

Confidentiality is a key component to the successful operation of any effective Ombudsman's office. It guarantees protection for complainants and cooperation from authorities.²³⁵ In order for complainants to feel that the Ombudsman's office is accessible, they must be assured that their complaint will be treated confidentially in all respects and that no one will have access to any information which they provide to the Ombudsman, without their consent. Prospective complainants need to be certain that they will not be subject to

any repercussions or reprisals for bringing a matter to the attention of the Ombudsman. Protection from potential repercussions for bringing a complaint, can best be achieved by keeping the source of the complaint confidential. Indeed, for any potential complainant, the advantage of having the Ombudsman independent from the chain of command, is meaningless, if their identity will automatically be disclosed, leaving them vulnerable to reprisal or repercussion. The same applies if, by virtue of someone accessing a complaint, the complainant can be identified.

Throughout the process of research and study on the need for mechanisms of voice at the DND/CF, it has been recognized by all that confidentiality is essential to establish effective mechanisms. For example, Brig.-Gen. (ret'd) Doshen in the *Doshen Paper #1*, concludes that members of the DND/CF must be confident in the efficacy of internal mechanisms of voice if they are to use them. He noted that this requires, among other things:

- ◆ procedural fairness which includes consistency in treatment across people, opportunity to present one's case and respond to counter arguments, the accuracy of information presented, an objective and unbiased judgement including the absence of conflicting interests, and an explanation of decisions;
- ◆ distributive justice that is fairness of outcomes across people;
- ◆ polite and respectful treatment;
- ◆ **confidentiality** of members complaint and,
- ◆ protection against retaliation both overt and covert.²³⁶ (Emphasis added)

Brig.-Gen. (ret'd) Doshen in recommending the establishment of an Ombudsman for the CF, explicitly recognized that the “**confidentiality**, informality and separation from the chain of command” would give such an office “considerable credibility and confidence in the eyes of the CF members”.²³⁷ (Emphasis added). He also noted that the existence of the Ombudsman (as a confidential and independent avenue) would help discourage retaliation against complainants and provide a further avenue for complaint should retaliation occur.²³⁸

²³⁵ *Setting Up an Ombudsman Office: A Checklist (Basic Principles, Statutory Provisions, Organization and Practices)*, *supra*, note 2 at para. 7.1.2.

²³⁶ *The Doshen Paper # 1*, *supra*, note 19, at page 34.

²³⁷ *Ibid.*, at page 51.

²³⁸ *Ibid.*

The government's response to the recommendations of the Somalia Commission of Inquiry, which announced the forthcoming appointment of the Ombudsman, also indicated that this office would provide "confidential, independent and informal assistance to members to help resolve complaints and concerns quickly and fairly".²³⁹

One of the major advantages of the creation of an Ombudsman as a mechanism for resolving complaints of unfairness and injustice is the element of confidentiality and safety from potential reprisal or retribution. This element is felt to be lacking in other mechanisms of complaint resolution, such as the redress of grievance process or complaining to one's Member of Parliament. As one CF member put it, "if I go to my Member of Parliament there will be repercussions, why waste time going through channels that will have repercussions on me?"²⁴⁰ Another Canadian Forces member remarked "in this organization we are too small, everyone knows that someone put in a grievance. Confidentiality is a myth. If people believe that no one will know that they put in a grievance that's not true [...]".²⁴¹

You recently re-iterated to me in correspondence that confidentiality is an essential feature of my Office:

Your office must carry enormous moral authority and credibility in relation to the senior decision-makers and information custodians within the Department of National Defence and the Canadian Forces, which will be derived in large measure from the neutrality and **confidentiality** of your office and our direct reporting relationship.²⁴²
(Emphasis added)

IMPACT ON OPERATIONS

A review of the input received during our consultation process, as well as a review of other Ombudsman's offices, reveals that **real** and **tangible** safeguards to protect confidentiality are essential in order for the Ombudsman's office to provide:

- ◆ Accessibility;
- ◆ Freedom from Fear of Retaliation or Reprisal; and

²³⁹ *A Commitment to Change: Report on the Recommendations of the Somalia Commission of Inquiry*, *supra*, note 39 at pages 8 and 16.

²⁴⁰ Meeting with NCM Reserve MP Edmonton, September 2, 1998.

²⁴¹ Meeting PMC's Officer's Mess, Land Forces Halifax, October 26, 1998.

²⁴² Correspondence from The Honourable Art Eggleton, P.C., M.P., Minister of National Defence to Ombudsman, Me André Marin, September 8, 1998.

◆ Effective Resolution of Complaints.

ACCESSIBILITY

Confidentiality is required for an **accessible** office. The entire functioning of an Ombudsman depends upon persons being willing to come forward and share their complaints and concerns about injustice or unfair treatment with the Ombudsman and his staff. In order for individuals to be willing to bring their problems forward to my Office and entrust them to me, I must establish a relationship of public trust and confidence. This confidence requires an assurance that complaints will be kept confidential and consequently, that complainants will not be subject to adverse consequences for bringing a matter to my Office's attention. In short, confidentiality makes the Ombudsman a "unique and safe" place to turn to.²⁴³

During the consultation process, the overwhelming view of members of the CF was that confidentiality was of "tremendous importance":²⁴⁴

- Independence and confidentiality are the key to credibility. (*Civilian Employee with the Military, LFWATC, Wainwright, September 3, 1998*)
- Who will we call if you don't keep everything confidential? (*Meeting with NCM Reserve MP, Edmonton, September 2, 1998*)
- People will be scared to go to the office without a complete guarantee of confidentiality. (*Meeting with NCM Reserve MP, Edmonton, September 2, 1998*)
- You need to guarantee complete anonymity to complainants, if not they will not go to you because of the repercussions and there will be retribution. (*Civilian employee with the Military, LFWATC, Wainwright, September 3, 1998*)
- We must have assurance that if we speak to you it will be confidential and we will not suffer retribution which will hinder our career path... we need the security to know we can call you in confidentiality. (*Telephone interview by a member of my staff, with a Sergeant, Fort Frontenac, August 26, 1998*)
- Your credibility depends on results and also on confidentiality. (*Coffee at RA Park, LFAA, Halifax, October 28, 1998*)
- Confidentiality will be a big issue for us. (*General Comments, Velika Kladusa, Bosnia, November 11, 1998*)

²⁴³ Mr. Wendall Jones, Ombudsman, Sandia National Laboratories, *Presentation on Confidentiality, supra*, note 212.

²⁴⁴ Meeting with Wing Personnel Support Section 4 Wing, Cold Lake, September 15, 1998.

- Very important if we go to you that information be kept confidential. It is the individual's choice if he/she wants it to be known. (*Meeting with Junior NCMs, 8 Wing Trenton, September 8, 1998*)
- Complaints would need to be anonymous or have protection to encourage members or their families to come forth... Need confidentiality, that's what I mean by anonymous. We tell you our name but it doesn't go further. (*Meeting with Military Family Group, CFB Halifax, October 26, 1998*)
- For confidentiality's sake assign a number and file by number, like Crime Stopper's does. (*Meeting with Junior NCMs, CFB Gagetown, October 29, 1998*)
- Confidentiality and independence are crucial for your office to be effective and credible. (*Luncheon, NATO, Brussels, November 4, 1998*)
- *Besoin de confidentialité pas de retribution.* (*Luncheon, Geilenkirchen, Germany, November 6, 1998*)
- Do you have lawyer/client privilege confidentiality? (*Visit at NAEWF, Germany, November 6, 1998*)

The need for confidentiality became readily apparent when we consulted the junior ranks during our visits to CF bases, wings or formations across Canada. During these consultations, we were told that if we wished members of the junior ranks to be frank with us about their concerns and their advice regarding the set up of our Office, we should speak to them without the higher ranks being present. In fact, in some instances, junior officers and non-commissioned members were only willing to speak to us once their supervisors were asked to leave the room. It was made very clear to us that the presence of higher ranks would have an overall chilling effect on what we would hear from the junior ranks:

- If you want to get frank viewpoints from the junior ranks, kick out the commanding officer. (*Meeting with Personnel from 402 Squadron, Winnipeg, September 16, 1998*)
- Get to Bosnia unexpectedly and get the troops alone. (*Meeting with Personnel from 402 Squadron, Winnipeg, September 16, 1998*)
- Some time ago we had a similar meeting as yours today and we were told before the briefing what we could say and could not say, these are the questions you can ask and questions you cannot ask – when we ventured into other issues, we were shut down and the commanding officer closed the question and answer session. (*Meeting with Personnel from 402 Squadron, Winnipeg, September 16, 1998*)
- When we meet with you, it's hard to speak if officers are around. (*Meeting with Marine Eng. – Leading Seaman – September 22, 1998*)
- It would be good that when you go around to speak to NCMs that you don't have a senior officer with you. Perhaps have a Sergeant show you around. (*Meeting 12 Wing Shearwater, October 27, 1998*)

In recognition of this fear amongst the junior ranks, on our recent visit to SHAPE, the commanding officer volunteered not to attend any of our meetings with civilian and military personnel at SHAPE, in order to ensure a good environment for open discussion.²⁴⁵

This desire for anonymity and confidentiality was also found to be present as one went up in the ranks of Canada's Forces. For example, during one consultation meeting with students, a Senior Officer was unwilling to comment if notes were being taken, out of concern that what he said might be recorded and construed as "eroding the chain of command".²⁴⁶

Our consultation with personnel at the Conflict Resolution Centre (CFB Borden), also confirmed that confidentiality was extremely important in gaining the trust of DND/CF members, such that they would come forward with their complaints:

- Confidentiality is seen as a real issue – people should have the option whether the complaint/investigation is confidential or not.
- We tell people that we must report back to the chain of command, we must give the name and describe the situation; it makes us wonder how many don't come to us because we offer no confidentiality. (*Meeting with Personnel, Conflict Resolution Center, CFB Borden, September 28, 1998*)

FREEDOM FROM FEAR OF RETRIBUTION OR REPRISAL

The need for strict confidentiality stems directly from the expressed fear that if one complains there will be retaliation directly by the person(s) complained about or indirectly by the system as a whole. Invariably, when the issue of confidentiality was raised during our consultations, the belief was expressed that if a complaint was made and the source of the complaint were known there would be direct reprisals:²⁴⁷

²⁴⁵ Meeting with Commanding Officer at SHAPE, Belgium, November 5, 1998.

²⁴⁶ CLFCSC Students, Fort Frontenac Mess, August 25, 1998.

²⁴⁷ For more examples, see Summary of Results of Focus Group Discussions, CFPARU Sponsor Research Project Report 95-1, "Problems Voicing Complaints: 2. Informal Reprisals Against Grievors", Contained in Annex C of the *Doshen Paper #1*, *supra*, note 19 at pages 25/37 to 37/37.

- Most times people want to speak up but are afraid to. (*Meeting with Junior Ranks, CFB Gander, October 6, 1998*)
- If one complains against a person in the department – they wagon around and cover their ass and squash the complainant. (*Meeting with Union Representatives, Edmonton, September 1, 1998*)
- The redress process was a major thing but don't go that route because of the administrative repercussions. (*Meeting with Military Police, NDHQ, August 28, 1998*)
- Personally I was told since I made a complaint, now I have a black cloud following me – we need to access you outside the military, strict confidentiality is crucial. (*Meeting with IAMS Technicians, Cold Lake, September 15, 1998*)
- If there is no confidentiality, people will be “black-balled” if they complain. (*General Conversation with Soldiers, 2 Royal Canadian Regiment, Training Exercise, Combat Training Centre, Gagetown, October 30, 1998*)
- Yes reprisals are a problem “big time”. Get rid of the people causing the problem. (*Meeting with Operations Staff, CFS Leitrim, November 25, 1998*)
- Redress up chain of command. If they don't have a decision for you, you've just pissed off your chain of command, and you will suffer for it. (*Meet and Greet, Golan Heights, Israel, November 7, 1998*)
- Need to protect people from reprisal. (*Presentation to Staff, Golan Heights, Israel, November 8, 1998*)

The issue of reprisal, was also raised by members at the recent Defence Ethics Conference, in response to the Defence Ethics Risk Survey, administered by the conference organizers. One of the issues, which the survey specifically attempted to measure, was whether conference participants felt that protection from reprisal was sufficient for those who spoke out on “ethical issues” in their work environment. Of the participants who responded, 11 percent indicated “no”, 17 percent indicated “some” and 24 percent indicated “50/50”. This would indicate that over half (52 percent) of the respondents felt that the protection from reprisal was sufficient only half or less than half the time. Approximately one third (29 percent) of the respondents felt that the protection was good, while only nine percent responded that it was “very good”.²⁴⁸ These responses should be read in light of the fact that the conference participants came from mostly senior ranks and there was lesser

²⁴⁸ 1998 Defence Ethics Conference, Conference Results – *Speaking Notes*. It should be noted that ten percent of the respondents indicated no response or that they didn't know or were unsure.

representation from the junior ranks, who are most likely to be concerned about protection against reprisal.²⁴⁹

Defence Ethics Conference participants were also asked in the survey, to identify the most serious ethical risks in their work environment. These responses identified reprisal as a key issue and showed that this concern is very much alive among members of the DND/CF, including members of the senior, as well as the junior ranks.²⁵⁰ Some of these responses were:

- ◆ Fear of reprisal if people tell the truth openly;
- ◆ Protection of individual(s) which bring ethical issues forward particularly those issue(s) that question the behavior of superiors;
- ◆ (1) lack of honesty, (2) personal integrity, (3) fear of retaliation;
- ◆ Reprisal/Ostracization – if speaking out. No firm sense of reprisal protection;
- ◆ Not discussing issues, ignoring negative solutions. Too many people afraid of being singled out if disturbing the chain of command for what they believe in;
- ◆ No experience with this yet. However, retribution has always been an issue on any subject;
- ◆ Reprisals which are not explicit and therefore impossible to address;
- ◆ Fear of reprisal for taking a stand.

Strong sanctions against interference in the conduct of any complaint before the Ombudsman and for effecting any sort of retribution or reprisal against anyone who has made a complaint, are essential features for the Ombudsman's operating framework.²⁵¹ Provisions, which penalize retaliation after it has already occurred, are not sufficient by themselves. It must be considered that reprisal or retribution can be difficult to detect and difficult to prove. It can often be done subtly, such as by spreading rumors or making derogatory comments about someone's character or often it can be disguised behind apparently legitimate motives.

²⁴⁹ *Ibid.* Some conference participants recommended more lower level participation or conferences for lower ranks.

²⁵⁰ *Ibid.* See also: *Defence Ethics Risk Survey Responses*, Question 7.

²⁵¹ For further discussion on this point, see Chapter 4 under sub-heading "Protection from Reprisal" at page 173 of this Report.

In order to earn credibility and the trust of the members of the DND/CF, we need to actively protect against reprisals happening in the first place, by following a strict code of confidentiality. It is important to note that the need for confidentiality stems from the fear of future retaliation. Whether retaliation or retribution will actually occur if confidentiality is breached is not the issue, so much as there is a perception that it will occur. It is this perception that will prevent complainants from coming forward to the Ombudsman with their problems.

Our consultations with all ranks of the Canadian Forces and with civilian members of DND revealed clearly that if individuals feel that confidentiality will not be strictly adhered to and there is a potential that their identities may become known, they won't complain. Consequently, if persons are afraid to turn to the Ombudsman, my Office as a mechanism for resolving injustice and unfairness will break down and become ineffective.

EFFECTIVE RESOLUTION OF COMPLAINTS

Confidentiality is required in order for the Ombudsman to be an effective tool for solving problems. Investigation or fact gathering will be a key component in resolving many of the complaints made to my Office. It is important that I be able to rely on the cooperation of those persons who possess information, which may be required to resolve a particular complaint. Much time and effort will be saved, where all parties are comfortable with providing my Office with information in a free flowing and frank manner. Furthermore, in order to resolve problems informally and at the lowest possible level, I must be able to rely on the credibility of my Office and my powers of persuasion. This implies that I must be able to frankly discuss matters both with the individuals who claim they have been wronged and with the authorities.²⁵²

This free flow of information is most likely to occur, where I can provide assurance that the information provided will remain confidential unless disclosure is required to further

²⁵² *Setting Up and Office: A Checklist (Basic Principles, Statutory Provisions, Organization and Practices)*, *supra*, note 2, at para. 7.1.2.

the investigation of the matter or to support a finding or recommendation. However where the problem is resolved quickly and informally to everyone's satisfaction, confidentiality of the information provided to my Office can be preserved.

IMPLEMENTATION

INTERNAL ISSUES

For confidentiality to be a truth, rather than be seen by stakeholders as an empty promise, I must be free to establish strict and clear procedures, which must be followed at all stages of the handling of complaints. I must also be given sufficient protections in my enabling authority. These procedures and protections will include:

- ◆ Oaths of Secrecy and Confidentiality;
- ◆ Procedures for the Taking of Complaints and Handling of Information;
- ◆ Clear Policies Outlining When Information May and May not be Disclosed;
- ◆ Provision for the Retention and Storage of Files;
- ◆ Establishment of an Access to Information and Privacy Coordinator for the Ombudsman's Office.

OATH OF SECRECY AND CONFIDENTIALITY

In order to instill confidence in the confidentiality of information provided to myself and my staff, all members of my Office should be required to swear an oath of secrecy.²⁵³ In recognition of the fact that my Office will be dealing with confidential and sometimes very sensitive information, I have been afforded a level three security clearance. All members of my staff who are responsible for handling complaints and receiving information pertaining to cases will also be required to hold appropriate security clearances.

²⁵³ *Report of the Committee on the Concept of the Ombudsman*, *supra*, note 43; *British Columbia's Ombudsman Act*, *supra*, note 148, s. 9(1)(2); *New Brunswick Ombudsman Act*, *supra*, note 148, s. 17(1); *Ontario's Ombudsman Act*, *supra*, note 148, s. 12(1)(2).

I therefore recommend that:

The Ombudsman and members of his staff should swear an oath of secrecy and confidentiality.

PROCEDURES FOR TAKING OF COMPLAINTS AND HANDLING OF INFORMATION

Confidentiality requires that complaints be received and information be stored under circumstances that will ensure that no information is “leaked” either through advertent or inadvertent action. During the consultation process, much concern was expressed about the ability to keep complaints confidential. For example, we were asked if the Office would be using caller ID or whether persons could call in anonymously, out of fear that their identities may not be kept confidential.²⁵⁴ In order to allay these fears strict safeguards must be put in place and followed in my Office’s day to day operations. We were also advised during the consultation process that the Ombudsman’s staff must be cognizant and must alert complainants that confidential information should not be faxed unless a secure line is available and that the confidentiality of e-mail may be compromised.²⁵⁵

Provisions must also be put in place to ensure that **all** potential complainants can have unfettered **confidential** access to my Office. A letter to the Ombudsman from a person who resides on any Canadian Forces Base, Wing or Formation, or who is deployed by the Canadian Forces or who is in detention, incarceration or hospitalized must be required to be forwarded immediately to the Ombudsman, unopened and unread. The same treatment must also be accorded to any correspondence from my Office to any such person. Telephone calls between such persons and any member of my Office must also be confidential and not subject to interception or monitoring. Furthermore, any communications between my Office and complainants should not be covered or counted under any restrictions on the right to send letters or other documents or receive or make telephone calls.²⁵⁶ Severe sanctions should

²⁵⁴ Meeting with Junior Ranks, CFB Gander, October 6, 1998.

²⁵⁵ Meeting with Senior Officer, Edmonton Land Forces Hospital, September 2, 1998.

²⁵⁶ See also: *Corrections and Conditional Release Act*, *supra*, note 72, s. 184; Alberta's *Ombudsman Act*, *supra*, note 148 s. 13; British Columbia's *Ombudsman Act*, *supra*, note 148 s. 12(3); New Brunswick's *Ombudsman Act*, *supra*, note 148 s. 13(4); Ontario's *Ombudsman Act*, *supra*, note 148, s. 16.

follow against anyone who opens mail or takes any other action to intrude upon the confidentiality of communications between another person and my Office.

I therefore recommend that:

Correspondence from any person who resides on any CF base, wing or formation, who is deployed by the CF or who is in detention, incarceration or hospitalized must be forwarded immediately to the Ombudsman, unopened and unread. The same treatment must be accorded any correspondence flowing from the Ombudsman's Office to such persons. All communications, including e-mail, telephone and cellular phone communications, between such persons and the Ombudsman or any member of his staff must be treated as confidential and not subject to interception.

Communications between the Ombudsman and any person should not be covered or counted under any restrictions on that person's right to send letters or other documents or to receive or make telephone calls.

Severe sanctions should follow against anyone who opens correspondence or takes any other action to intrude on the confidentiality of communications between another person and the Ombudsman.

Strict procedures should be put in place in the Ombudsman's Office to ensure confidential handling of all complaints including all documentation provided to the Ombudsman's Office in the course of dealing with a complaint.

Mechanisms should also be created to ensure that all records of internal and external communications to or by the Ombudsman or his staff are not accessible to anyone outside of the Office including the DND. This should include all records of internal and external phone calls, e-mails and cellular phone communications.

In order to provide completely confidential access to my Office, it is likely that a separate computer system with e-mail will have to be established, outside of the existing DND/CF computer network. At present, the computer system provided to my Office through DND is not secure or confidential and in fact contains the following warning:

This computer/network is a DND/CF resource intended for official purposes only. **Please note that there shall be no assumption of privacy and that users are subject to monitoring at any time.** This network is approved for processing up to “Protected A” information only. Click on this window to accept these terms.²⁵⁷ (Emphasis added)

Persons who wish to contact my Office must be able to do so without being subject to any monitoring and all of my Office’s computer files must not be subject to access by any outside source including the DND/CF.

I therefore recommend that:

In addition to having access to the DND/CF computer systems, the Ombudsman’s Office should have a separate computer system by which complainants can access the office. This system should not be subject to monitoring and its files must not be accessible by any outside source including the DND/CF.

CLEAR POLICIES OUTLINING WHEN INFORMATION MAY AND MAY NOT BE DISCLOSED

An assurance of confidentiality requires that all information including notes and records received during the course of taking a complaint and in investigating and resolving complaints be kept confidential. Furthermore, the circumstances in which such information may be disclosed must be clearly delineated. All investigations and inquiries, conducted by my Office, should be conducted in private. All members of my Office must be bound not to disclose any matter coming to their attention except in so far as is necessary for the purpose of investigating or resolving a complaint or to substantiate the findings or recommendations of the Ombudsman in a particular case.²⁵⁸

²⁵⁷ Warning as it currently appears on our computer network.

²⁵⁸ *Report of the Committee on the Concept of the Ombudsman, supra*, note 43.

This approach was endorsed by the Committee on the Concept of a Federal Ombudsman, which concluded that:

The ombudsman and each member of his staff should be bound not to disclose any matter except in so far as is necessary for the purposes of investigation or to substantiate the findings or recommendations of the ombudsman in a particular case. In applying the exception, the ombudsman and his staff should be obligated to take every reasonable precaution to avoid revealing personal information and other sensitive matters. In this regard the legislation should be guided by s. 60(2) of the Canadian Human Rights Act and such additional exemptions as may be incorporated in any freedom of information legislation, if these are judged appropriate.²⁵⁹

Because of the over-riding concern about the potential for retribution or retaliation, disclosure of the identity of the complainant should be avoided. This protection should extend to cover any information, which in the opinion of my Office may serve to identify the complainant. As was noted during the consultation process, even if names are crossed out, in many situations complainants will still be identifiable.²⁶⁰ The need to ensure that the identity of individual complainants is fully protected was felt to be of particular concern in cases where supervisors will have direct access to complainants.²⁶¹

In many cases, the investigation and/or resolution of a complaint will result in the identity of the complainant being revealed. In such cases, the complainant should be notified prior to any steps being taken to follow-up on the complaint. My staff must also consult with the complainant on any options, which may avoid or minimize the extent of disclosure of such information.

²⁵⁹ *Ibid.* at page 50.

²⁶⁰ Meeting with ADM (Pol & Com) at NDHQ, August 17, 1998.

²⁶¹ *Ibid.*

I therefore recommend that:

All investigations conducted by the Ombudsman's Office should be conducted in private.

The Ombudsman and members of his staff should be bound not to disclose any matter coming to the Ombudsman's attention except in so far as is necessary for the purpose of an investigation or to substantiate findings or recommendations of the Ombudsman in a particular case.

PROVISION FOR RETENTION AND STORAGE OF CLOSED FILES

No persons other than members of my Office should have access to information contained in the Ombudsman's files. All files should be stored under circumstances in which confidentiality can be assured. Clear provisions must exist to prohibit public access to areas where files are stored. Access to electronic records of Ombudsman's cases, including telephone records must also be restricted to members of my Office only. I must also be free to establish guidelines for the destruction of closed files, once a certain period of time has elapsed.²⁶²

I therefore recommend that:

The Ombudsman should be free to establish clear policies for the confidential storage and retention of case files and all records in possession of the Office, including telephone records. The Ombudsman should also be free to establish clear guidelines for the destruction of closed files, after specific periods of time have elapsed.

ESTABLISHMENT OF AN ACCESS TO INFORMATION AND PRIVACY COORDINATOR FOR THE OMBUDSMAN'S OFFICE

Currently, requests for access to information in the hands of the Ombudsman's Office are handled through the DND/CF Access to Information and Privacy Coordinator. As my Office moves towards becoming operational, however, the time involved in responding to *Access to Information Act* and *Privacy Act* requests and complaints will increase until I am

²⁶² See for example: *Alberta's Ombudsman Act*, *supra*, note 148, s. 29.

exempt from this legislation.²⁶³ Dealing with such requests will also require the development of expertise and experience to meet the unique needs of my Office. The review of documents and the ultimate determination of whether access to information exemptions apply, must be restricted to members of my staff, in order to ensure confidentiality and neutrality. There is also potential that confidentiality may be compromised if my staff is required to provide the DND/CF members (who serve in the DND/CF Access to Information and Privacy Coordinator's Office) with access to and/or copies of complaint files, for purposes of review and response to access and privacy requests. Furthermore, if the ultimate decision regarding exemptions and the release of information from my Office is placed in the hands of DND/CF personnel, the independence of my Office is clearly compromised.

I must be free to appoint an Access to Information and Privacy Coordinator as part of my staff. *Access to Information Act* and *Privacy Act* requests should be handled within my Office. My staff will be free to consult the DND Access to Information and Privacy section and DND Legal Counsel whenever advice is required. The ultimate review of documents and decisions about the release of information must however lie with my Office.

I therefore recommend that:

Until such time as the Ombudsman's Office obtains an exemption from the *Access to Information and Privacy Acts*, the Ombudsman may establish a Co-ordinator for *Access to Information and Privacy Act* requests separate from the DND/CF Access to Information Co-ordinator.

EXTERNAL ISSUES

EXEMPTION FROM THE ACCESS TO INFORMATION ACT

The purpose of the *Access to Information Act* is to provide a right of access to all records under the control of government, in accordance with the principle that government information should be available to the public and that necessary exceptions should be clearly

²⁶³ See specifically sub-heading "Exemption from *Access to Information Act*" at page 111 of this Report.

delineated and specific.²⁶⁴ Under the *Access to Information Act*, any person who is a Canadian citizen or a permanent resident, can access any record under the control of a government institution, unless the information contained in the record falls within one of the enumerated exceptions of the *Act*.²⁶⁵ Government institutions which are bound by the *Act* are listed in Schedule I of the *Act*. Given that my Office falls within the Department of National Defence, which is listed as a government institution in Schedule I of the *Act*, my Office will be subject to the application of the *Act*, unless specifically exempted.

In order for my Office to be in a position to offer a **complete** assurance of confidentiality for complainants and those subject to investigation, an exemption from the requirement to disclose information pursuant to requests under the *Access to Information Act* is required. During the consultation process, numerous concerns were expressed that an exemption from the *Access to Information Act* was mandatory in order to ensure confidentiality. During our meeting with Lt.-Col. Pellicano, who was involved in the evolution of my Office, he indicated that he recognizes that my Office is subject to *Access to Information* legislation. He also indicated that he realizes that this is inconsistent with one of the functions of the Ombudsman, recognized by the *Doshen Paper #1*, which was confidentiality. Lt.-Col. Pellicano specifically recognizes that this is a problem, as he questions whether a junior member would want to access the Ombudsman, under such circumstances.²⁶⁶

It was clearly felt by those members of the DND/CF and many of the others we consulted, that if the Ombudsman were not exempt from the application of the *Access to Information Act*, this would “impair the integrity of the complaint process and the investigation of complaints.”²⁶⁷

²⁶⁴ *Access to Information Act*, *supra*, note 231, s. 2(1).

²⁶⁵ *Ibid.*

²⁶⁶ Meeting with Lt.-Col. Pellicano, DPCR, November 18, 1998.

²⁶⁷ Meeting with NCM Reserve MP Edmonton, September 2, 1998. See also: Meeting with ADM (Pol & Com) at NDHQ, August 17, 1998; Meeting with Senior Officer, Land Forces Western Area, Edmonton, September 1, 1998.

- Will my complaint be accessible through access to information? (*Meeting at Combat Training Centre, CFB Gagetown, October 29, 1998*)
- If you are not exempt from the Access to Information Act we foresee two problems: All your office will be doing is dealing with ATI requests; You will have no credibility if you cannot offer confidentiality. (*Coffee at RA Park, LFAA, Halifax, October 28, 1998*)
- Need Access to Information exemption. Will your office give information if I make a complaint and my supervisor wants to look at it? You must offer protection. (*Visit to 36 GCB, LFAA, Halifax, October 28, 1998*)
- Your office needs to be confidential and exempt from the Access to Information Act and the Privacy Act, also you cannot be forced to report back to anyone. (*Luncheon, NATO, Brussels, November 4, 1998*)
- You need not to be submitted to the Access to Information Act. (*Meeting with Me Daniel Jacoby, Q.C., Québec Ombudsman, August 19, 1998*)

Although the values of transparency and accessibility, which are reflected in the *Act* are fundamental to a democratic society, the *Act* itself recognizes that there are certain enumerated and specific exceptions that need to be made for the good of society as a whole. In the case of the Ombudsman's Office, it is submitted that the need for the elimination of injustice, inequality and unfair treatment should be given precedence over specific individual rights to access information contained in the Ombudsman's files.

Specifically delineated exceptions from the application of the *Act*, will not hinder the overall transparency and accountability of the Ombudsman's Office, as will be outlined later in this report. Furthermore, without an exemption to the *Act*, it is unfair and misleading to promise potential complainants that their complaints will be kept confidential. As the Assistant Director General of the Investigations Branch for the Official Languages Commissioner notes, he is placed in the awkward position of having to advise individuals that the office guarantees confidentiality but at the same time telling them that anyone can access their file.²⁶⁸ My Office will not be able to ensure confidentiality of its files when

²⁶⁸ Meeting with Mr. Gilbert Langelier, Assistant Direct General Investigations Branch, Office of the Commissioner of Official Languages, August 18, 1998.

anyone, including the person who is the subject of the complaint, will be able to access information contained in the file under the *Access to Information Act*.

In recognition that there will be specific instances in which exceptions must be made to individual rights to access government information, the *Act* delineates a number of instances in which government offices can claim exemptions. These exceptions reflect the principle that in some cases the ability of government to perform important and legitimate functions for the good of the whole will conflict with the individual's need to have access to government information. Where these two needs conflict, the good of society as a whole is given precedence by setting out specific exemptions in the *Act*, to allow government to perform certain functions free from access to information requests.

In order to assure all complainants that their complaint and any ensuing investigation will truly be kept confidential, my Office requires an exemption from mandatory disclosure pursuant to the *Access to Information Act*. If the Ombudsman is forced to assess each file on a case-by-case basis whenever there is a request and demonstrate that each particular file falls within an exemption under the *Act*, complainants will not be sufficiently assured that the confidentiality of their particular file is protected. Requiring a detailed review of relevant files every time an access to information request is received will also be extremely time consuming and costly. Valuable staff resources will be required to review large amounts of material and analyze whether each line qualifies for an exemption to the *Act*. Any release of information, which directly or indirectly leads to a complainant being identified, could also result in severe consequences of reprisal or retribution.

INADEQUACY OF EXISTING EXEMPTIONS

Section 17 of the *Access to Information Act*

Under section 17 of the *Access to Information Act*, the head of a government institution may refuse to disclose any record requested under the *Act*, which contains information, which if disclosed, could reasonably be expected to threaten the safety of individuals. Although there may be an argument on a case-by-case basis, that information contained in some complaints could fall within this exception under some circumstances, it is recommended that all complaints and investigations be protected from disclosure. This is especially important given that a direct threat to the safety of the individual may be difficult to assess, especially prior to the disclosure of any particular information.

Section 19 of the *Access to Information Act*

Section 19 of the *Access to Information Act*, provides that the head of a government institution shall refuse to disclose any record requested under the *Act* which contains personal information as defined in section 3 of the *Privacy Act*. Subsection 19(2) provides for disclosure of such information only where the individual to whom the information relates consents, it is publicly available or is in accordance with section 8 of the *Privacy Act*, which allows for disclosure of personal information in a number of specifically delineated circumstances.

Reliance upon section 19 of the *Access to Information Act* and editing complaints to remove personal information, is also an insufficient and inadequate method of ensuring confidentiality of complaints and investigations conducted by the Ombudsman's Office. This exemption would require each file to be purged of personal information every time a request is received, which would be extremely time consuming. More importantly however, merely editing personal information in responding to access requests greatly erodes the degree to which my staff can assure complainants and those consulted during investigations, that the information, which they provide to the Ombudsman, will be kept confidential.

The limitations of relying solely on the section 19 exemption as the basis for confidentiality of complaints can be seen when one looks specifically at section 3 of the *Privacy Act*, which defines personal information. Throughout the consultation process, concerns were expressed that the editing of names and other personal information from records of complaints was not sufficient to ensure confidentiality and protect persons from reprisal or retribution. The person about whom the complaint is made will likely be sufficiently familiar with the complainant that they can identify them based solely on the content of their complaint.

Section 16(1)(a) of the *Access to Information Act*

Section 16(1)(a) of the *Act* provides an exemption for information obtained or prepared by a government institution, which is an investigative body specified in the regulations, in the course of lawful investigations pertaining to the detection, prevention or suppression of crime or the enforcement of any law of Canada or province. This exemption applies where the record is less than 20 years old. Bodies which are exempt under section 16(1)(a) and pursuant to the Access to Information Regulations, include the Canadian Forces Military Police, the Director of Investigations and Research for the Department of Consumer and Corporate Affairs, the Royal Canadian Mounted Police and the Special Investigations Unit of the Department of National Defence (now the National Investigation Service).²⁶⁹

An exemption under section 16(1)(a) of the *Act* would require an amendment by the Governor in Council to section 9 and Schedule I of the Access to Information Regulations, to specify my Office as an investigative body. Amendments to the regulations, for purposes of section 16(1)(a), are done by the Governor in Council on recommendation by the Minister of Justice.

One of the criteria for such a recommendation, includes that the main work of the body seeking the exemption must be connected with investigations relating to the enforcement of one or more federal statutes or a specific issue of concern to the government.

²⁶⁹ *Access to Information Act* Regulations, s. 9 and Schedule I.

The investigations must also be of a criminal or quasi-criminal nature,²⁷⁰ which is not the type of investigation I expect my Office would normally be conducting.

Given the specific wording of section 16(1)(a), an exemption under this section may also prove too specific and limited to cover the all of the types of investigations carried out by the Ombudsman's office.

SUITABLE OPTIONS

Recognizing the Ombudsman as a Separate Entity from the DND

The most preferable option to ensure confidentiality for my Office's files would be to exclude my Office from the application of the *Act* in its totality. If my Office were not included in any of the government institutions listed in Schedule I of the *Act*, it would not be subject to any of the provisions of the *Act* and thus specific exemptions would not need to be fashioned.²⁷¹ This option would require that my Office be recognized as a separate entity, apart from the DND, which is specified as a government institution in Schedule I of the *Act* and is thus subject to the application of the *Act*. In order to this achieve this status for my Office, it is likely that a separate piece of legislation recognizing my Office as an independent body, apart from the DND, would be required. As this recommendation appears not to be in keeping with the public policy parameters, which have been set for my Office, it may unfortunately not be a viable option at this time.

Section 24 of the *Access to Information Act*

A stronger and more comprehensive exemption from disclosure (than those contained in sections 17, 19 or section 16(1)(a) of the *Act*) could be achieved through the application of section 24 of the *Act*. This section allows for a head of a government institution to refuse to disclose any record requested under the *Act* which contains information, the disclosure of

²⁷⁰ *Investigative Body Designation: Procedure and Questionnaire*, s. 16(1)(a) *Access to Information* and s. 22(1)(a) *Privacy Acts*, Department of Justice, Information Law and Privacy Section.

²⁷¹ Office of the Privacy Commissioner, for example, is not listed as a Government Institution for purposes of Schedule I and is thus not subject to the application of the *Act*. On this point, see also: Meeting with Mr. Julien Delisle, Executive Director, Privacy Commissioner of Canada, December 1998.

which is restricted by a legislative provision set out in Schedule II of the *Act*.²⁷² In order to bring my Office within the protection of section 24 of the *Act*, a specific legislative provision would be required, declaring that information received and produced by my Office is confidential. An amendment to schedule II of the *Access to Information Act*, adding this provision to the schedule of legislative exemptions, would also be required.

Section 16(1)(c) of the *Access to Information Act*

The application of section 16(1)(c) could serve to a limited extent and as the least desirable option to meet the need for assuring confidentiality of cases brought forward to my Office. Section 16(1)(c) would exempt from disclosure **any information**, which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province and also to the conduct of any lawful investigation. This section specifically requires the application of an “injury” test. This would require that in each case where an access request was made, an argument must successfully be put forward to show that the disclosure of the information sought would be injurious to the enforcement of a law or the conduct of a lawful investigation. It is important to note that recent court decisions on the application of section 16(1)(c) have served to further restrict the availability of this exemption. The Federal Court of Appeal has taken the view that section 16(1)(c) does not protect information unless its disclosure would harm an **ongoing** or **imminent** investigation.²⁷³ The court has held that this section cannot be relied upon in cases where disclosure is sought to be denied on the basis of protecting the **investigative process**, where the concern is that disclosure would harm **future** investigations or have a chilling effect on such.²⁷⁴ For my Office to be eligible to claim an exemption under section 16(1)(c), an amendment would be required to section 10 and Schedule II of the Access to Information Regulations or my Office must have specific and enumerated powers of investigation provided for in a legislative scheme pursuant to the *National Defence Act*.

²⁷² See for example the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, s. 47(3) which provides that information received by a conciliator in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed except on consent.

²⁷³ *Rubin v. Canada (Minister of Transport)*, [1997] F.C.J. 1614 (C.A.). See also: *Information Commissioner of Canada and the Privacy Commissioner of Canada v. Chairperson of the Immigration and Refugee Board* (December 24, 197) (Federal Court of Canada, Trial Division); and see *Information Commissioner Annual Report 1997-1998*, *supra*, note 145 at pages 33 and 39.

²⁷⁴ *Ibid.*

Another limit to both the section 16(a) and section 16(c) exemptions of the *Act* is that they only cover information which was obtained “pursuant to an investigation” or which may be injurious to the enforcement of a law or the conduct of an investigation. Where a complaint is received by the Ombudsman and jurisdiction is declined, it is unlikely that section 16 would apply.

I therefore recommend that:

The necessary legislative steps required to bring my Office within the exemption accorded by section 24 of the *Access to Information Act* should be taken. In the alternative, the necessary legislative or regulatory steps should be taken to bring my Office within the exemption provided by section 16(1)(c) of the *Act*.

*EXEMPTION FROM THE **PRIVACY ACT***

Under section 12(1) of the *Privacy Act*, an individual who is a citizen or a permanent resident has the right to access personal information about themselves, which is in the hands of the government. The potential impact of such access requests on my Office and its ability to ensure confidentiality must be viewed in light of the definition of “personal information”, contained in section 3 of the *Act*. Personal information is broadly defined to include such things as (g) “the views or opinions of another individual about the individual”. Information obtained by my Office during its investigation of complaints, may include personal information in relation to various individuals. Consideration must also be given to the need for exemption from access requests under the *Privacy Act*. In order for assurances of confidentiality to be real and effective, access to information obtained from complainants and during investigations must be restricted from all avenues. An individual who cannot obtain disclosure of information under the *Access to Information Act*, may attempt to access personal information gathered about themselves during the investigation of a complaint by way of a request under the *Privacy Act*. Individuals may attempt to access such information in an attempt to try and identify the complainant. Although the identity of the complainant may already be known by the subject of the complaint or may become known during the

course of an investigation, there may be situations where this is not the case. For example, there may be instances where an investigation is not pursued or is discontinued and no recommendations are made, at the request of the complainant, out of fear of their identity becoming known and fear of potential reprisals. Allowing for disclosure of information in such circumstances, would severely impact on the willingness of individuals to be frank and forthright with my staff during the course of their investigations.

I therefore recommend that:

All necessary legislative or regulatory steps be taken to bring my Office within available exemptions to the disclosure of information under the *Privacy Act*.

PROTECTION AGAINST COMPELLED DISCLOSURE OF CONFIDENTIAL INFORMATION

For the promise of confidentiality to be fulfilled, information in the possession of my Office needs to be protected from compelled disclosure. Whether through a subpoena issued to myself or my staff or through compelled disclosure pursuant to access to information legislation, once my Office can be required to disclose information contained in our case files, any assurance of “confidentiality” becomes illusory.

In order to safeguard both the appearance and the practice of neutrality and confidentiality, Ombudsmen should resist appearing as a witness in any judicial or quasi-judicial proceedings on behalf of any party including complainants and their employer.²⁷⁵

Protection against subpoena is the best means of ensuring that confidentiality remains intact and preventing the Ombudsman and current and former staff from being used as tools of discovery.²⁷⁶ The privilege of confidentiality, which attaches to information provided to the Ombudsman, belongs to the Ombudsman and not to the complainant or any other party. The Ombudsman is not an advocate for complainants and the interests of the Ombudsman

²⁷⁵ *Options Functions and Skills: What an Organizational Ombudsperson Might Want to Know*, *supra*, note 49, at page 2.

²⁷⁶ *Ombudsman Legislative Resource Document*, *supra*, note 150.

and the complainant will not always be the same. As an independent third party, I have a duty not to disclose any information provided to my Office, except in accordance with clearly delineated guidelines, regardless of whose interests such disclosure would serve. The Ombudsman must not allow himself to be used as a witness or a tool of discovery by any party.

The Ombudsman Association (TOA), notes that many Organizational Ombudsmen have agreements with their employers that the employer will not call the ombudsperson in their own defence. These types of agreements, however, do not completely protect the Ombudsman or his staff from being compelled to testify or to produce documents in any judicial or quasi-judicial proceedings. Such agreements clearly impinge upon the neutrality and independence that an Organizational Ombudsman must have from its employer. Practically, they serve to place the confidentiality of the Ombudsman's records in the hands of the employer, who could waive the informal agreement at any time or in any particular case. Furthermore, in the context of the DND/CF, where there is much skepticism surrounding the ability of government officials and the chain of command to respect confidentiality, potential complainants are unlikely to feel assured that the such an agreement would be abided by in all cases. An informal agreement between my Office and the Minister that I would not be compelled to testify or produce documents on behalf of the government in any proceeding, will not prevent any other party including a complainant or someone who has been complained about, from issuing a subpoena to myself or a member of my staff.

A specific provision must be made in my Office's enabling authority, stating that no Ombudsman or any present or former member of his staff, shall be called to give evidence or produce documents in any court or any proceedings of a quasi-judicial or administrative nature, in respect of anything coming to their knowledge in the course of carrying out their duties.²⁷⁷ This approach was reviewed and recommended by the Committee on the Concept of a Federal Ombudsman, which concluded that:

²⁷⁷ See *Access to Information Act*, *supra*, note 231, s. 65; *Corrections and Conditional Release Act*, *supra*, note 72 s. 189; British Columbia's *Ombudsmans Act*, *supra*, note 148, s. 9(5); New Brunswick's *Ombudsman Act*, *supra*, note 148, s. 24(2); Ontario's *Ombudsman Act*, *supra*, note 148, s. 24(2); Alberta's *Ombudsman Act*, *supra*, note 148, s. 24(2). Alberta's *Ombudsman Act* however, does provide that the Ombudsman and his staff are compellable at a public inquiry (see s. 22 and s. 23).

As already indicated, the Committee believes that an ombudsman and his staff should be under an obligation to protect information they acquire in the course of their duties, except as may be necessary to investigate a case or substantiate a recommendation. However, there remains the possibility that they might be forced to reveal confidential information in a court action or be subject to contempt of court. To avoid this, and thus to ensure their ability to obtain full and frank information from officials and the production of necessary documents, legislation creating the office of an ombudsman should declare that the Ombudsman and his staff are not competent or compellable witnesses regarding any matter brought to their knowledge in the exercise of their function.²⁷⁸

In order for this exception from subpoena to be recognized in a formal court proceeding, it should be set out in legislation. A regulation will have sufficient binding authority over any proceedings within the DND/CF organization but will likely not be sufficient to quash a subpoena in a judicial or quasi-judicial proceeding. Specific exception should be made to allow the Ombudsman or any member of his staff to give evidence or produce documents in proceedings for the prosecution of anyone for interfering with an Ombudsman's investigation, providing false or misleading information or enacting reprisal on anyone who makes a complaint to the Ombudsman or perjury.

I therefore recommend that:

The *National Defence Act* should be amended to declare that the Ombudsman and any member of his staff are exempt from being compelled to testify or to produce documents in any judicial or quasi-judicial or administrative proceeding, except where required for the prosecution of anyone for interfering with an Ombudsman's investigation, for providing false or misleading information to the Ombudsman or for enacting a reprisal on anyone who makes a complaint to the Ombudsman or for perjury.

In the alternative, a regulation should be passed pursuant to the *National Defence Act* to declare that the Ombudsman and any member of his staff are exempt from being compelled to testify or to produce documents in any judicial or quasi-judicial or administrative proceeding, except where required for the prosecution of anyone for interfering with an Ombudsman's investigation, for providing false or misleading information to the Ombudsman or for enacting a reprisal on anyone who makes a complaint to the Ombudsman or for perjury.

²⁷⁸ *Report of the Committee on the Concept of the Ombudsman, supra*, note 43, at page 51.

OTHER OMBUDSMEN MODELS

PRIVATE SECTOR

Most “soft” Organizational Ombudsmen who deal with internal staff problems tend to do no formal investigations and write no case reports.²⁷⁹ The TOA maintains a code of ethics requiring strict confidentiality.²⁸⁰ However, since many practicing Organizational Ombudsmen in the private sector have no formal mechanisms to protect confidentiality, they must shred their notes and do not keep any case files. They are constantly conscious of creating a record of any complaint they receive. The TOA advises students in its Ombuds 101 Course to get rid of all records according to a standard policy or procedure, because “once a subpoena arrives, you can’t touch the documents.”²⁸¹

The American Express Organizational Ombudsperson advises that at American Express, “we shred everything”. We only keep notes and documents as long as they are absolutely needed. No files are kept except for generic information on demographics.²⁸² The Harvard University Medical School Ombudsperson, tells complainants in sexual harassment cases “don’t tell me who it is or where it is, let’s just talk about the problem”. She does take notes during her interviews with complainants but she too has a shredder in her office and notes are shredded as soon as the meeting is over.²⁸³

Concordia University Ombudsman

The Terms of Reference of the Concordia University Ombudsman’s office state that should the pursuit of any inquiry necessitate the disclosure of details that identify an

²⁷⁹ *Options, Functions and Skills: What an Organizational Ombudsperson Might Want to Know, supra*, note 49.

²⁸⁰ The Ombudsman Association Code of Ethics. See also: Notes from The Ombudsman Association (T.O.A.), Ombudsman 101 Course, October 21-23, 1998.

²⁸¹ Wendall Jones, Ombudsman, Sandia National Laboratories, The Ombudsman Association (TOA), Ombuds 101 Course, *Presentation on Confidentiality, supra*, note 212.

²⁸² Wendy Friede, American Express Ombudsman, The Ombudsman Association (TOA), Ombuds 101 Conference, *Presentation on Operating an Ombudsman’s Office*, American Express Ombudsman, October 21-23, 1998.

²⁸³ Linda Wilcox, Ombudsperson, Harvard Medical School, The Ombudsman Association (TOA), Ombuds 101 Course, *Presentation on Skilled Listening As a Neutral*, October 21-23, 1998.

applicant, the applicant shall be informed. Disclosure is limited to “those who need to know”. Further, should an applicant withdraw an application to protect his or her anonymity, the Ombudsman shall respect this decision. The Terms of Reference also provide that the Ombudsman shall respect the confidentiality of any confidential information or materials which they have access to and confidentiality of the applicant must be respected in all of their reports.

The terms of reference also provide that the Ombudsman shall maintain suitable records of complaints, findings and recommendations which shall be accessible only to the staff of the Ombuds office. However, such files shall be destroyed according to a retention schedule determined in accordance with provincial legislation.

TD “Between Us” Programme

This office maintains that confidentiality is the “cornerstone” of the office. As is the practice in many Organizational Ombudsman’s offices which do not have formal protections for confidentiality, they choose to protect confidentiality by not keeping notes or records of any complaints coming to the office and they avoid asking for names and specifics. They do not conduct any follow-ups and they rely on complainants to come and tell them if the matter has been dealt with. They admit that “complainants don’t always come back to tell us whether or not the situation/problem has been resolved”.²⁸⁴ Presumably since they do not keep notes or records, they have no way of ensuring on their own that a situation of injustice or unfairness has been remedied. This lack of formal protection for confidential complaints, has raised skepticism about the ability of such an office to actually ensure confidentiality. One participant at the Defence Ethics Conference remarked, after the TD “Between Us” presentation, that “They give lip service to confidentiality – how can they really protect complainants from management”?²⁸⁵

²⁸⁴ Presentation by TD “Between Us” Programme Counsellors at the Defence Ethics Conference, October 22, 1998.

²⁸⁵ *Ibid.*

PUBLIC SECTOR

Provincial

The majority of provincial Ombudsmen offices have specific provisions in their enabling legislation to ensure that their assurances of confidentiality of complaints are in fact carried out.²⁸⁶ Provincial Ombudsmen are also exempt from the application of their respective provincial freedom of information acts. This exemption is achieved by either not listing the Ombudsman's office in the schedule of bodies to which such legislation applies or by declaring the Ombudsman to be an "officer of the legislature", which is exempt from such legislation.²⁸⁷

The Alberta Ombudsman commented in his 1997 Annual Report that:

In Alberta, the Freedom of Information and Privacy Commissioner has ruled that pursuant to section 4(1)(c) of the Freedom of Information and Privacy Act of Alberta, filed copies of Ombudsman's records are excluded from the application of the Act and cannot be produced under the legislation.²⁸⁸

The Nova Scotia Ombudsman commented to my staff that "it is the issue of confidentiality that makes us effective. You can sit down with the MND and DM and they know it is confidential."²⁸⁹

The British Columbia Ombudsman also noted that she was not subject to the *Freedom of Information and Protection of Privacy Act*, as pursuant to section 3(1)(c) she is

²⁸⁶ See: Alberta's *Ombudsman Act*, *supra*, note 148, s. 19; British Columbia's *Ombudsman Act*, *supra*, note 148, s. 9(6)(7); Ontario's *Ombudsman Act*, *supra*, note 148, s. 18(2).

²⁸⁷ British Columbia's *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165, and Schedule I of the *Act*; Meeting with Mr. Barry E. Tuckett, Manitoba Ombudsman, September 16, 1998; Meeting with Legal Staff of the Ontario Ombudsman's Office, September 9, 1998. See also: *The Ontario Ombudsman's Office Complaints Resolution Manual*, June 1998; Meeting with Mr. Douglas Ruck, Q.C., Nova Scotia Ombudsman, October 28, 1998. Telephone Interview with Ms. Ellen King, New Brunswick Ombudsman, by a member of my staff, December 16, 1998; Meeting with Me Daniel Jacoby, Q.C., *Protecteur du citoyen du Québec*, August 19, 1998.

²⁸⁸ Alberta Ombudsman, *31st Annual Report*, *supra*, note 145 at page 6; Meeting with Mr. Scott Sutton, Alberta Ombudsman, September 4, 1998.

²⁸⁹ Meeting with Mr. Douglas Ruck, Q.C., Nova Scotia Ombudsman, October 28, 1998.

exempt, as an “officer of the legislature”. She commented to me that “you must get yourself into that FOI definition”.²⁹⁰

The British Columbia Worker's Compensation Board (WCB) Ombudsman is not exempt from that province's *Freedom of Information and Protection of Privacy Act*. The WCB Ombudsman notes that as a result their records are very “cryptic”. He commented to a member of my staff that “the exemption will determine whether or not you can sell confidentiality to your constituency. If you are not exempt – you'd be misrepresenting.” The WCB Ombudsman is lobbying for an exemption from the *Act*, as it is felt that “it's violating the right of the complainant to come forward with any security”.²⁹¹

Federal

Commissioner of Official Languages

The Commissioner is not exempt from the *Access to Information Act*, although investigations are done in private and are not published. Individuals are told that the office guarantees confidentiality but at the same time they are also told that someone can access their file! The inherent contradiction in this advice is obvious. The Assistant Director General of the Investigations Branch advised that he would take the option to be exempt from the *Act*. He conceded that “it is difficult getting collaboration during interviews because the results can be accessed”.²⁹²

Departmental Ombudsman for Foreign Affairs and International Trade

The Ombudsman for the Department of Foreign Affairs and International Trade has her own informal policy of confidentiality but has no formal protections. The Ombudsman will not acknowledge that someone has met with her and because she does not have formal protection for her records and she is subject to the *Access to Information Act*, she keeps as few records as possible. She frankly admits that if a complainant does not call her back or maintain contact, it's hard to keep track of what happened because she does not keep detailed

²⁹⁰ Meeting with Ms. Dulcie McCallum, British Columbia Ombudsman, September 2, 1998.

²⁹¹ Telephone interview with Mr. Peter Hopkins, British Columbia Worker's Compensation Ombudsman, by a member of my staff December 16, 1998.

notes. Further, because of her lack of record keeping, she cannot offer any follow-up. Her notes are routinely destroyed after information is jotted down, in order to protect the confidentiality of complainants. Documentation is not retained because of the concern that it would have to be disclosed pursuant to an access request. She also admits that in serious complaints such as abuse of power or authority, neither the Ombudsman nor the complainant are comfortable putting information down on paper. People are often scared and do not want to pursue formal channels because confidentiality cannot be assured.²⁹³

Department of Indian Affairs and Northern Development Ombudsman

The Ombudsman for the Department of Indian Affairs and Northern Development (DIAND) serves an informal role within the organization. She does not possess any investigative powers and views her role to be one of dissemination of information and to direct people to the right venues. Where she is asked to intervene, she will mediate in a non-threatening, non-confrontational manner.²⁹⁴

The DIAND Ombudsman related that she has over 131 active on-going files in her office. However, she admitted that she does not take notes during her first meeting and initial consultation with complainants because she cannot ensure confidentiality of her records. The inherent limitations in terms of follow-up and resolution of complaints under such conditions is obvious. The Ombudsman was very cognizant that everything which is recorded is available through the *Access to Information Act*. She sees the *Act* as directly stifling her capabilities as an Ombudsman: "it's killing what I'm doing."²⁹⁵

Office of the Correctional Investigator

The Correctional Investigator is bound to follow strict provisions for confidentiality of complaints and investigations under sections 182 and 183 of the *Corrections and*

²⁹² Meeting with Mr. Gilbert Langelier, Assistant Director General, Investigations Branch, Office of the Commissioner of Official Languages, August 18, 1998.

²⁹³ Meeting with Ms. Isabelle Massip, Department of Foreign Affairs and International Trade Ombudsman, August 18, 1998.

²⁹⁴ Meeting with Ms. Chantal Paradis-Chartier, Department of Indian Affairs and Northern Development Ombudsman, September 23, 1998. See also: *Staff Ombudsman Report*, Department of Indian Affairs and Northern Development, December 1, 1996 to November 30, 1997.

²⁹⁵ *Ibid.*

Conditional Release Act. The *Act* provides that neither the investigator, nor anyone acting on his behalf shall disclose any information that comes to their knowledge in the exercise of their powers or the performance of their functions. Specific exceptions for disclosure are provided, where such is necessary in the opinion of the Correctional Investigator to carry out an investigation or establish grounds for findings or recommendations. Disclosure is also permitted in the course of a prosecution for an offence under the *Act* or for perjury. The *Act* also requires that the Correctional Investigator and his staff take “every reasonable precaution to avoid the disclosure of, and shall not disclose” any information in specific delineated circumstances. These circumstances include situations where disclosure may result in a serious disruption to an inmate’s institutional or conditional release programme or result in physical or other harm to the inmate or any person.²⁹⁶ The Correctional Investigator is not exempt from the application of the *Access to Information Act*. The office recognizes however the constraints this places on confidentiality and is currently reviewing the applicability of exemptions under this legislation to their office (including the application of section 16 of the *Act*).

Office of the Information Commissioner and Office of the Privacy Commissioner

The *Access to Information Act*, contains strict provisions for confidentiality, to be followed by the office of the Information Commissioner, which are similar to those of Correctional Investigator’s office.²⁹⁷ The Information Commissioner takes the position even on an application for judicial review that, any party which challenges the Commissioner’s recommendation is not entitled to have access to the Commission’s investigative records and that the confidentiality of the office’s investigative process must be respected.²⁹⁸ The *Privacy Act* also provides that that the investigation of a complaint made to the Privacy Commissioner shall be conducted in private.²⁹⁹ The Privacy Commissioner is not listed in the schedule of government institutions to which the *Access to Information Act* applies and as such, is not subject to the application of the *Act*.³⁰⁰

²⁹⁶ *Corrections and Conditional Release Act*, *supra*, note 72, s. 183(2).

²⁹⁷ See: *Access to Information Act*, *supra*, note 231, s. 62 through to s. 64.

²⁹⁸ *Information Commissioner Annual Report 1997-1998*, *supra*, note 145 at pages 33-34.

²⁹⁹ *Privacy Act*, *supra*, note 231, s. 33(1).

³⁰⁰ Meeting with Mr. Julien Delisle, Executive Director, Office of the Privacy Commissioner of Canada, December 9, 1998.

MILITARY

Parliamentary Commissioner for the German Armed Forces

The German Parliamentary Commissioner for the German Armed Forces also has a strict policy of confidentiality. Article 9 of the *Law on the Parliamentary Commissioner for the Armed Forces* provides that where a commissioner takes action in response to a petition, it shall be left to his discretion to disclose the fact of a petition and the name of the petitioner. The Parliamentary Defence Force Commissioner must refrain from the disclosure if this is the wish of the petitioner and compliance with such a desire is not barred by legal duties. The Commissioner is obliged to maintain secrecy regarding matters that have come to his official knowledge even after his term of office has come to an end. However, he may disclose official communications or matters which are known to the general public or which, because they are unimportant, do not require secrecy.³⁰¹

Australian Defence Force Ombudsman

The Defence Force Ombudsman (DFO) of Australia also conducts investigations in private, in the interests of confidentiality. Under section 35 of the *Ombudsman Act* 1976 all officers, including the Ombudsman, must observe confidentiality. Section 35 prevents disclosure of any information by an officer or ex-officer except in specifically delineated circumstances.³⁰² It should be noted however that the degree of confidentiality is limited to the extent that the Australian D.F.O. is not exempt from the application of Australia's

³⁰¹ Karl Gleumes, *supra*, note 89, at page 34. Article 10 (2) of the *Law on the Parliamentary Commissioner for the Armed Forces*, provides that the Commissioner shall not even if he is not in office any more, give evidence on such matters before or out of a court or make statements without permission. This permission shall be given by the President of the *Bundestag* in agreement with the defence committee. The permission to give evidence as a witness shall not be denied unless it would be to the detriment of the public good of the Federation or of one of the German Laender or it would severely jeopardize or considerably impede the performance of public duties.

³⁰² Functions and Powers of the Commonwealth Ombudsman, November 1998, document provided by Lt.-Col. P.R. Tyrell, Assistant Defence Advisor, Australian Army Senior Standardization Representative. See also: Telephone Interview with Ms. Susan Matthews, Director of Investigations, Commonwealth Ombudsman, Australia, by a member of my staff, December 15, 1998 and *Ombudsman Act* (Commonwealth Australia 1976) s. 35.

Freedom of Information Act. Specific exemptions can be claimed under the *Act* however, including an exemption for documents containing material obtained in confidence.³⁰³

Inspector General for the Netherlands

The Inspector General of the Netherlands Armed Forces follows working methods of “total independence”, “undisputed confidence” and “absolute confidentiality”.³⁰⁴

Israeli Defence Force Soldiers' Complaints Commissioner

The Israeli Commissioner's office follows a strict code of confidentiality where complaints are treated as “classified” information. The Commissioner's reports refer only to case numbers and the names of units and soldiers involved in a complaint are withheld from reports.³⁰⁵

ANALYSIS

Once the safeguards which allow the protection of confidentiality are eroded, we are forced to limit ourselves in how we respond to complaints, in order to avoid betraying the confidence of complainants. To do this would erect barriers around my Office. An examination of Ombudsmen models which do not have exemptions from access to information legislation or other sufficient mechanisms to ensure confidentiality, reveals how the absence of these safeguards can severely compromise the ability of the Ombudsman to run an effective and credible office.

At first glance, it may seem surprising that Organizational Ombudsmen advocate the destruction of notes and case files. This practice is clearly a necessary evil for Canadian Ombudsmen who are subject to access to information legislation. However, if Ombudsmen are to follow through on their promises of confidentiality, in the absence of exemptions from the *Access to Information Act*, they are left with no other options. Without such promises

³⁰³ Telephone interview with Ms. Susan Matthews, Director of Investigations, Commonwealth Ombudsman, Australia, by a member of my staff, December 16, 1998.

³⁰⁴ *The Function of the Inspector General of the Dutch Armed Forces, supra*, note 109.

³⁰⁵ Meeting with (Brig.-Gen. (ret'd) Uzi Levizur) Israeli Defence Force Soldiers' Complaints Commissioner, November 9, 1998.

and assurances it is unlikely that many persons would bring their problems forward. It is highly unlikely that the drafters of the *Access to Information Act* and the *Privacy Act* intended that this legislation interfere with individual rights of confidential access to an Ombudsman or with the ability of an Ombudsman to protect the interests of justice and fairness. It is clearly undesirable that an office, whose mandate is to serve members of the public by finding just and equitable solutions to problems, be reduced to shredding documents in order to ensure confidentiality. The strength, accessibility and ultimate credibility of my Office will depend on the measure of confidentiality I will be able to provide for my constituency. Shredding notes and destroying documents is quite simply an insufficient and inadequate method to achieve the measure of confidentiality, which is both expected and required of my Office.

The practice of routinely shredding notes, refusing to retain documents or case files and deliberately refusing to seek details about complaints, also clearly hampers the ability of an Ombudsman to effectively and professionally pursue the resolution of complaints. It has been estimated that the DND/CF Ombudsman's Office will receive in the vicinity of 8,000 contacts in its first year of operations. It is unrealistic and impossible to expect that any of these complaints can be handled in an effective and fair fashion if no case files are kept and all notes are shredded. At the same time however, it is equally unfair to promise complainants confidential handling of complaints when their files will be subject to review by anyone who makes an access to information or privacy request and can be subject to subpoena in any court proceeding.

The relationship between keeping proper documentation and note-taking and conducting a fair review process, was highlighted in the Auditor General's report on the CHRC. The report assessed the CHRC investigation procedures to determine whether it was adhering to its own standards, by randomly reviewing 50 complaint files handled by the Commission. The report noted that key documents were often not completed by investigators and that the results of key discussions between investigators and supervisors, as well as of telephone discussions and interviews with the parties, often were not recorded in files. As a result of this review, the Auditor General expressed concern that the CHRC was

not consistently adhering to some of its key standards designed to ensure the quality of investigations.³⁰⁶

In addition, the practice of shredding documents violates the spirit and intent of the *Access to Information Act*. The deliberate destruction of documents to avoid the operation of the *Act*, will be subject to penalty, pending the passage of Bill C-208 in the House of Commons.³⁰⁷ This bill proposes to specifically deem that it is an offence to destroy, mutilate or alter a record, falsify a record or make a false record or to conceal a record or to cause anyone else to do these things, with the intent to deny a right of access under the *Act*. Such an offence would be punishable by up to two years imprisonment and/or a fine not exceeding \$10,000 on proceeding by indictment.

In order to be credible, I fully recognize that my Office must be transparent and subject to public scrutiny, while at the same time confidentiality of complainants must be ensured. Exemptions from access to information and privacy legislation and subpoena, as well as other mechanisms to protect the confidentiality of individual complaints, will not impede the overall transparency of my Office. My regular reports to you will shed light on problems and issues brought to the attention of my Office, including information on statistics as to the number of complaints, the type of complaints received and how they were resolved. If there is any concern that strict safeguards for confidentiality may impair the transparency of my Office, one only need to refer to the annual reports of any of our provincial Ombudsmen. All of these offices are highly respected and transparent organizations despite the strict protections of confidentiality they have in place.

³⁰⁶ *Report of the Auditor General, supra*, note 139 at para. 10.68 through 10.74.

³⁰⁷ Bill C-208 an *Act to Amend the Access to Information Act*, as passed by the House of Commons of Canada, November 16, 1998.

4

CHAPTER FOUR

A CREDIBLE REVIEW AND INVESTIGATIVE PROCESS

During the course of the consultation, we examined a variety of Ombudsmen models in several fields, including Military Ombudsmen in other nations.³⁰⁸ We then identified the best operational practices from each, selected those that are most suited to the unique requirements of DND/CF, and distilled them into several principles and powers that are most likely to ensure that the Office is credible to all stakeholders from day one.

The overriding principle is that this Office will attempt to resolve issues using low level and informal means at all points throughout the process, where it is practical and appropriate to do so.

ACCESS TO THE OMBUDSMAN'S OFFICE

CONSTITUENCY, CORE JURISDICTION AND MANDATE

As indicated above, certain public policy parameters had been established prior to my appointment. My recommendations regarding the Ombudsman's constituency, jurisdiction and mandate mirror these parameters.

³⁰⁸ See: Chapter 2 and also Comparative Study of Ombudsmen Models and other Similar Agencies, Appendix IV of this Report.

I therefore recommend that:

All Regular Force members, Reserve Force members, former service members, civilian employees, their parents, spouse or next of kin may bring a complaint or issue to the direct attention of the Ombudsman's Office, without charge.

The Ombudsman has jurisdiction to issue recommendations concerning individual and systemic issues and injustices.

The DND/CF has undergone significant personnel reductions over the past several years. The effective strength of the Regular Force will be reduced to approximately 60,000 by March 31, 1999. The Reserve will be reduced to approximately 30,000 and the number of civilian employees will also be reduced to approximately 20,000 Full Time Equivalents (FTE) by April 1, 1999.³⁰⁹ It is important to note that although civilian employees are represented as 20,000 FTE's, this figure could be higher in terms of actual constituents on account of job sharing programmes, part time and/or contractual employment within the DND/CF.³¹⁰ Moreover, these figures do not factor in past members and their dependants. Notwithstanding the massive reduction in personnel undertaken by the Department, the Ombudsman's constituency base is, in factual terms, vast.

I believe that the issue of constituency remains, however, an outstanding public policy matter specifically where other Departments may share and/or have competing jurisdictions. By using the terms "former" or "past" members to define the DND/CF Ombudsman's constituency, the CF Veterans fall within the scope of the Ombudsman's constituents. Consequently, there may be an overlap of jurisdiction, mandate and representation. If the Ombudsman is mandated to receive *all* matters brought to his or her attention from past members (including Veterans and their dependents), this would substantially increase the cost of operating the office and the necessary resources to carry out

³⁰⁹ *Defence White Paper* (1994).

³¹⁰ During the course of the consultation process and as a matter of public policy with respect to my "civilian constituency base", I met with the UMCC sub-committee (Union Management Consultation Committee) at the National Union meeting held in Ottawa on August 24, 1998. In response to the UMCC's concerns with respect to potential overlap in representation – and perhaps also in our respective mandates – I invited the UMCC to present me with a common front as to how it viewed my role. I have not yet received a response.

the mandate.³¹¹ The Minister of National Defence should consider addressing this matter with the Minister of Veterans Affairs in order to determine whether or not the DND/CF Ombudsman would be mandated to deal with issues which fall under the jurisdiction of the Department of Veterans Affairs (DVA). I will postpone intervening in an issue which would appear to fall within the purview of DVA until I receive further direction from you on this point.

I therefore recommend that:

The Minister of National Defence should consider consulting the Minister of Veterans Affairs and issue a directive to the Ombudsman with respect to the Ombudsman's jurisdiction over matters that fall within the mandate of the Department of Veterans Affairs.

We have already received requests for assistance from Non Public Fund (NPF) employees, cadets and DND/CF contractors. It is not clear whether these groups fall within my jurisdiction. As a public policy issue, you may wish to consider if these, or any other groups, fall within my jurisdiction. I will postpone intervening in an issue directly involving these groups until I receive further direction from you on this point.

I therefore recommend:

The Minister of National Defence should issue a directive to the Ombudsman in respect of the Ombudsman's jurisdiction over NPF employees, cadets, DND/CF contractors or any other group or agency.

³¹¹ Veterans Affairs Canada is responsible for Canadians who belong to the following client groups: (1) Armed Forces and merchant navy veterans who served in the First World War, the Second World War or the Korean War; (2) certain civilians who are entitled to benefits because of their wartime service; (3) former (and, in certain cases, current) members of Canada's Regular Forces (including those who have served in Special Duty Areas), the Reserve Forces of Canada; and (4) survivors and dependants of the above. At the end of 1994-1995, there were an estimated 501,690 veterans in Canada. It is estimated that by year-end 2001, the Department of Veterans Affairs clientele base will be approximately 339,000. It is important to note that this figure does not factor in Canadian Veterans' families and dependants. Consequently, this constituency base could presumably double, if not triple. (Figures taken from material supplied to my staff, by the Department of Veterans Affairs).

MECHANISMS OF ACCESS AND INITIAL CONTACT

It is essential that all constituents have unfettered, direct, and private access to my Office, free of charge. Members must be able to access my Office easily and confidentially. Even the lowest ranking member in a remote unit should be able to access the Ombudsman directly and privately, rather than through official channels.³¹²

The Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces, recently observed that "the CF Leadership will need to explain and promote actively the benefits of the new arrangements (third-party intervention and mediation function of the organization Ombudsman) within the context of a "learning organization (...)".³¹³ I would add that it is also incumbent upon me to promote the existence and operations of the Office of the DND/CF Ombudsman as well as its benefits for the organization and its members to maximize stakeholders' accessibility to my Office.

We intend to set up the following vehicles to achieve these goals:

- ◆ A toll-free number, accessible from anywhere in the world. We are looking at additional methods of contact for personnel deployed abroad. Any records generated would not be accessible by the DND/CF;
- ◆ E-mail access independent of any DND/CF system including Internet access;³¹⁴
- ◆ A regular programme of visits to bases, formations and wings, which will include both an educational component on the operations of the Ombudsman's Office as well as opportunities for personnel to meet with us informally off-base on a confidential basis.

³¹² Much of what follows under this heading was recommended in the *Doshen Paper #2*, *supra*, note 26.

³¹³ *Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces, Interim Report - 1998*.

³¹⁴ As previously mentioned in this Report, our computer system can be accessed from DND and, according to a warning that appears each time the computer is booted up, "users are subject to monitoring at any time". While I accept that there may be valid reasons for this practice within DND in general, I do not believe it is appropriate in respect of my Office, as it may severely compromise actual and perceived confidentiality and independence. We are examining our options to ensure that all our communications and computer systems are not accessible to any agency outside this Office.

REGIONAL REPRESENTATION

Our consultation with members of the DND/CF revealed a virtually unanimous consensus. We must have regional representation to be effective and credible. Suggestions varied from a representative on or near every major CF base, formation or wing, to, at a bare minimum, offices on the east and west coasts. We encountered a widespread feeling that an office based solely in Ottawa would be perceived as remote and/or as an extension of NDHQ. There was some cynicism that “a bunch of suits from Ottawa” would or could not understand their particular and sometimes very local issues:

- Ottawa is a long way from the hangars down below. *(Meeting with a Senior Officer, Edmonton, September 1, 1998)*
- Ottawa is out of touch from the rest of us. *(Meeting with NCMs, Edmonton, September 2, 1998)*
- There is a certain perception problem with the Ottawa/Toronto driven policies. If you want to have credibility here in the West, you need local representatives. The representatives must understand the "West mentality", which is different than in the East. *(Civilian Employee, LFWATC Wainwright, September 3, 1998)*
- It is a must to have a regional representative. Talking to a phone will not do it; face to face would be much better. *(36 CBG Members, LFAA, Halifax, October 28, 1998)*
- If there are no regional offices you will be just a bunch of bureaucrats up in Ottawa. *(Meeting with Dockyard Workers, CFB Halifax, October 26, 1998)*
- The national issues and policies can be dealt with from Ottawa, but personal matters need regional representation. *(Meeting with Junior NCMs, CFB Gagetown, October 29, 1998)*

The rationale underlying regionalisation is obvious and compelling. Regional offices will be crucial in terms of local knowledge, contacts and networking, education, outreach and timely response and resolution of complaints. They will in all likelihood be cost-effective.

There are 3,000 members deployed at any one time in Europe and the Middle East. During our consultations, we heard of the unique issues that they face, and that many of them felt strongly that they needed a European-based Ombudsman's Office that would address those issues:

- You will need to be accessible. Will you have a representative in Europe? Face to face is most important. *(Meeting with members at NATO, Brussels, November 4, 1998)*

- What is unique about this place is that there is a general feeling that people are abandoned here. Out of sight, out of mind from Ottawa. (*Meeting with Senior Officers, NATO, Brussels, November 4, 1998*)
- You should have a presence in Europe. I would like to see you have an office in the area. You have to be, have a presence. It is important to be here, things happen in operations and can be nipped in the bud at a lower level. (*Meeting with Senior Officers at SHAPE, Belgium, November 5, 1998*)
- There is a need for regional offices. (*Meeting at Camp Holopina, Bosnia, November 12, 1998*)

We were also told by many during the consultation that every major base, formation and wing in Canada should have access to a local office.³¹⁵ While I am persuaded by the logic of the argument, I have decided to err on the side of caution at this time, at least until we have the opportunity to undertake a cost/benefit analysis. I intend to revisit this issue as operational requirements dictate. I have therefore decided to recommend that initially we set up two regional offices in Canada and one in Europe.

In order to ensure confidentiality and independence, and to convey a consistent message to stakeholders the regional offices should be physically located outside DND property, just as my Office in Ottawa is physically separate from NDHQ.

I therefore recommend that:

The Ombudsman's Office should be resourced to set-up three regional offices in addition to the office in Ottawa, one in Western Canada, one in Atlantic Canada, and an office in Europe, to act as a front line resource for issues and complaints originating from those areas. These offices will not be located on DND property. The Ombudsman will review the requirement for regional offices on a regular basis, and make further recommendations as he or she sees fit.

³¹⁵ This would reflect the practices of the British Columbia, Ontario and Québec Ombudsmen, who each have a network of offices. During my visit to Esquimalt, a Senior Officer pointed out that while the NIS had a regional office in Edmonton, fifty percent of their work was on the West Coast, which had created some problems.

THE MANDATE

PRELIMINARY INVOLVEMENT

One of the first questions we asked during the consultation process was at what point should the Office get involved in a complaint or issue. We heard a wide variety of opinions, ranging from the view that we should not get involved in any manner until all other avenues had been exhausted, to the position that the complainant should have the option of having the Office directly involved from the outset. Some, particularly junior ranks, thought the Office should replace or act as an alternative to existing mechanisms.

This is an extremely sensitive area. As noted, there are significant expectations within the DND/CF that my Office will be a panacea for problems and injustices, real or perceived. Chief of Review Services (CRS) staff anticipate that we will receive approximately 8,000 contacts in our first operational year. We cannot possibly deal with each and every one in an identical manner. Even if we chose to do so, the resource implications would be staggering. In keeping with the practice of virtually all Ombudsmen, I will not normally become involved in an issue or complaint until all existing mechanisms are exhausted.

We must develop an operating framework that most effectively and efficiently targets those situations that lend themselves to fruitful intervention at a specified juncture, or where my Office can intervene in a manner that results in meaningful and tangible change to the greatest benefit for the greatest number of members. At the same time, we must attempt to resolve issues at the first possible opportunity and at the lowest possible level, while doing everything we can to avoid being inundated by issues we cannot effectively deal with, or which can be effectively dealt with by existing mechanisms.

INFORMATION, REFERRAL AND EDUCATION

One of the functions of all Ombudsmen, organizational or otherwise, is to educate the complainant as to what options are available and refer him or her to the appropriate channel or mechanism. There are a plethora of organizations and agencies both within and without the DND/CF designed to resolve problems and injustices; ranging in scope from Military Family Resource Centres to the future Military Police Complaints Commission. One of the roles of my Office will be to direct individuals and groups who contact my Office to the right place to go for help with their particular issue, and give existing mechanisms the opportunity to resolve issues in the first instance.

I therefore recommend that:

The Ombudsman should be a direct source of information, referral and education to assist individuals to access existing channels of assistance and redress within the DND/CF.

OMBUDSMAN'S EXERCISE OF DISCRETION

SUFFICIENT PERSONAL INTEREST

My Office cannot handle 8,000 complaints and treat each one in an identical manner. I will have to assess each case on its merits when determining whether or not to invoke my mandate. I intend to refer to the following guidelines to assess and prioritize each case, based on the premise that I retain discretion as to whether or not to invoke the mandate in any particular instance. I need to guard against my Office being used for improper purposes, such as malicious and vexatious complaints, nor can it become clogged with frivolous matters. In the event that I do not invoke the mandate, I will inform the complainant of my reasons for not doing so.

Although my Office is mandated to deal with both individual and systemic injustices, where individual complaints are brought forward, the complainant who deals with my Office

should normally be the person most directly affected by the issue. This will not prevent my Office from dealing with systemic issues in which there is a public interest in having such matters resolved, as I will retain the ultimate discretion to invoke the mandate.

I therefore recommend that

The Ombudsman will determine whether the complainant has sufficient personal interest in any matter complained about to the Ombudsman, or if not, whether other special circumstances exist, to warrant invoking the mandate.

USE OF EXISTING MECHANISMS

There is a possibility that my Office may be able to resolve an issue, prior to making a formal determination whether or not to invoke the mandate, by merely acting as a sounding board and listener to individual problems. This is sometimes enough to resolve an issue in and of itself. According to the background material supplied by NDHQ regarding the setting-up of this Office, this sounding board and listening function also gives the complainant an opportunity to vent their concerns to a neutral party.

There may indeed be a valuable opportunity at the point of first contact to educate and assist in ascertaining what options are available. However, we must be cautious before going much further than that at this point in the process. I do not think that we should be attempting to resolve issues by intervening, investigating or engaging in “shuttle diplomacy”, nor should we be taking any other proactive measure **at this juncture**. As noted below, if we do get involved in every case as the avenue of first resort, we run the risk of undermining existing systems, including the chain of command, by not giving them the chance to do their jobs. Additionally, there are considerable resource implications in getting involved in possibly 8,000 different issues a year. In any case, relatively few of the hundreds of calls and letters we have received to date appear to be resolvable at this level, as most have already been through existing mechanisms and have no further recourse. The majority of these callers require far more than a mere vent for their frustrations, or coaching as to how to manage their particular issue.

Many people, particularly in the chain of command, felt very strongly that they deserve the opportunity to try to resolve any problems first. I agree. If the Ombudsman intervenes as soon as a request for assistance is received, albeit informally, it may compromise the chain of command by not giving it the chance to solve the problem. This Office should not circumvent, subvert or override the authority of any existing system as a matter of course, including the chain of command.³¹⁶ Nor do we intend to replace existing grievance mechanisms for DND civilians, nor in any way interfere in the primacy of collective agreements in the workplace,³¹⁷ nor indeed any other system in place to resolve issues. These operating procedures demonstrate that commitment.

On the same topic, we also heard that we should do everything we could to avoid duplication. Several parties expressed concern that the Office would become yet another avenue of redress, which, when used simultaneously with existing mechanisms, may create even more work for those responsible for resolving complaints in the field. We heard that complainants sometimes used multiple channels at the same time; for example, submitting a complaint through the redress of grievance system and the Canadian Human Rights Commission, as well as simultaneously contacting their elected representatives. While I make no judgment at this time as to whether using all available channels is a proper or desirable practice in all cases, I do not believe that adding the Ombudsman to the list is a positive step.

My Office may become involved in an issue or complaint once all other available channels and mechanisms have been exhausted. I emphasize the word **may**. Given the huge

³¹⁶ Many of the statutes governing Provincial Ombudsmen have provisions to the effect that the Ombudsman may or shall refuse to investigate if the complainant has not availed himself of an existing adequate remedy or right of appeal. See for example, Alberta's *Ombudsman Act*, *supra*, note 148, s. 12(1)(a) and s. 14(1)(a); British Columbia's *Ombudsman's Act*, *supra*, note 148, s. 11 and s. 13(c); Ontario's *Ombudsman Act*, *supra*, note 148, s. 14(4) and s. 17(1); and New Brunswick's *Ombudsman Act*, *supra*, note 148, s. 12(2)(a) and s. 15(1)(a). This is also true of several military Ombudsmen. For example, in a letter to the Canadian Forces Attaché dated December 16, 1998, the Australian Defence Force Ombudsman (DFO) Director of Investigations wrote that "[e]xcept in special circumstances, under the *Act* the DFO can only investigate a matter after a serving member has exercised his or her right to seek redress of grievance within the Defence Force [...] However, we frequently look at delays in the redress process".

³¹⁷ *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 and CFAO 7.07.

volume of estimated complaints, the Ombudsman must have a strong power of discretion and not hesitate to exercise it. Further, there may be a reluctance in some cases to resolve issues at other forums if the Ombudsman is required to look into each issue that is brought to his or her attention.

Therefore, the Ombudsman will not normally consider invoking his or her mandate until all existing mechanisms have been exhausted. However, the Ombudsman may intervene, at his or her discretion, at any time when existing mechanisms fail to address an issue or complaint within a reasonable time, or where other special circumstances exist.

I therefore recommend that:

The Ombudsman, at his or her discretion, will not, absent special circumstances, formally invoke his or her mandate if an adequate remedy or right of appeal already exists whether or not the complainant has availed himself or herself of the remedy or right of appeal.

PUBLIC INTEREST TEST

It is very important that I focus the resources of the Office on those areas where my intervention will be of the greatest benefit to the organization and its members, and to the public as a whole. This process will involve the consideration of a variety of factors, including, but not limited to, the timeliness with which the complaint was made, the age of the complaint and the likely cost of investigating the complaint. It may or may not be in the public interest to pursue a given matter. Each case will require careful assessment based on its facts and in regards to factors such as age of complaint, timeliness of complaint and the judicious use of resources.

AGE OF COMPLAINT

Since the announcement of the creation of my Office, and despite widespread publicity that we are not yet operational, we have received hundreds of phone calls and letters requesting assistance. A significant proportion of these relate to events that occurred

years, sometimes decades ago.³¹⁸ We have to construct a mechanism to deal with this, or run the risk of being inundated with historical complaints which we may be inadequately resourced to deal with effectively. This is not to say that these complaints are unworthy of investigation, rather it is a question of using scarce resources to the best possible advantage.

TIMELINESS OF COMPLAINT

The Ombudsman should have the discretion not to invoke his or her mandate in respect of any complaint that is not brought to his or her attention within a reasonable time of the issue arising. What is reasonable will largely depend on the circumstances, and will be decided on a case-by-case basis. Obviously, I will take into account if the complaint has been in the process of being dealt with by other mechanisms, whether the complainant is incapacitated, at what point the complainant became aware of the issue, or any other relevant factors.

JUDICIOUS USE OF RESOURCES

We have a duty to ensure that limited resources are used in the most efficient and effective manner possible. A balance must be struck between the degree of alleged injury and the cost of pursuing a matter. For example, if a complaint is dated, of a minor nature, has no systemic implications if justified and will require considerable resources to investigate, then I may choose to exercise my discretion not to investigate. Obviously, I will carefully consider each case prior to making my determination, and keep the complainant fully informed of the reasons for my decision.

I therefore recommend that:

The Ombudsman will consider whether it is in the public interest to invoke his or her mandate in respect of any complaint made to him or her.

³¹⁸ The oldest received to date concerns an issue that arose in 1954 and has still not been resolved.

FRIVOLOUS, TRIVIAL OR VEXATIOUS COMPLAINTS

We were told on numerous occasions during the consultations that we should not waste resources on investigating frivolous or trivial matters. I agree, and will weed out such cases. However, I am aware that exercising my discretion in these circumstances requires a careful assessment of the facts; a matter that may appear trivial to some may not be to others, particularly the complainant. Further, we must avoid my Office being used for any improper motive or purpose. Matters that are clearly vexatious will be not be considered by my Office, other than possibly under the provisions outlined “malicious and vexatious complaints” below.

I therefore recommend that:

The Ombudsman will not investigate any complaint that is deemed by him or her to be frivolous, vexatious or trivial.

MANDATE INVOKED

GENERAL

After an initial review of a complaint or issue, I will exercise my discretion whether or not to invoke my mandate in any particular case, as indicated above.

SPECIAL

MND DIRECTED INVESTIGATIONS

There will be situations where it is in the best interests of the DND/CF to have an impartial agency independent of the chain of command investigate issues that arise from time to time. Because of the historic lack of such a body, the DND/CF has, on occasion, resorted to retaining outside civilian investigators to look into these incidents or issues, at considerable cost. The creation of my Office will reduce or eliminate the need to retain such

assistance. Furthermore, there is sometimes a perception that the investigators are hand-picked, with a vested interest and somehow beholden to the organization. My Office is independent of the chain of command, and thus is perfectly positioned to cost-effectively conduct these investigations, particularly in light of its unparalleled investigative and legal expertise, mainly civilian staff with non-military backgrounds, and comprehensive knowledge of, and access to, the DND/CF organization.

The power to direct an Ombudsman to conduct an investigation is by no means uncommon. For example, the Norwegian Defence Force Ombudsman must investigate when instructed by the Minister of Defence, as must the Parliamentary Commissioner for the German Armed Forces when instructed by the *Bundestag*. In Canada, the Correctional Investigator may commence an investigation at the request of the Minister of the Solicitor General.³¹⁹ Even lower levels of government have decided to use this option to resolve issues. For example, the Winnipeg City Council "may refer to the City of Winnipeg Ombudsman a matter that is before Council for consideration, and the Ombudsman shall, subject to any special direction of Council, investigate the matter[...]"³²⁰

Accordingly, I recommend that:

The Ombudsman shall investigate any matter when requested to do so by the Minister of National Defence.

OWN MOTION

All provincial and many Organizational Ombudsmen have the power to self-initiate investigations into issues where no complaint has been made, when the Ombudsman determines it is in the interests of the public or the organization to do so.³²¹ The federal specialty Ombudsmen, such as the Information Commissioner and Official Languages Commissioner, possess a similar capability. This power is an essential tool for obvious

³¹⁹ *Corrections and Conditional Releases Act*, *supra*, note 72 s. 170(1)(1).

³²⁰ *City of Winnipeg Act*, S.M. 1989-90, c.10, s. 68(2).

³²¹ See: Comparative Study of Ombudsmen Models and other similar Agencies, Appendix IV of this Report.

reasons. Generally, “own motion” investigations are generated by systemic issues. The power to initiate investigations reinforces my independence and role as a “barometer”, giving me the capacity to pursue matters without a specific complaint being made to me.

Accordingly, I recommend that:

The Ombudsman may invoke his or her mandate in any circumstances where he or she deems it appropriate.

OPERATING FRAMEWORK

LOW LEVEL OMBUDSMANRY

When the Ombudsman determines to invoke his or her mandate, the Ombudsman will first, if appropriate to the circumstances of the case, attempt to resolve the matter by traditional low level Ombudsmanry, using the ten points defined by Dr. Rowe, as follows:

- ◆ listening/venting;
- ◆ providing information;
- ◆ reframing issues/developing options;
- ◆ referring;
- ◆ advice/coaching;
- ◆ informal third party intervention;
- ◆ looking into a problem;
- ◆ formal mediation;
- ◆ propose changes to policies and practices;
- ◆ monitoring and upward referral of trends.³²²

Our goal is to resolve problems. In spite of the widespread cynicism we encountered regarding “soft” TOA-style Ombudsmanry,³²³ I believe that there will be many situations that

³²² *Options, Functions and Skills: What an Organizational Ombudsperson Might Want to Know, supra*, note 49 at pages 5 - 10.

³²³ See: Chapter 2 - "Ombudsmen Models" under sub-heading "Analysis" at page 41 of this Report.

can be resolved or rectified using a low key, collegial approach. My Office will vigorously attempt to use these tools to achieve resolution, provided it is practical and realistic to do so. One of the fundamental strengths of my Office is the ability to access senior personnel, and I envisage working collegially with the chain of command and Divisional System to resolve problems informally, whilst at the same time remaining open and transparent. I will use this access to the fullest in those situations where such efforts are likely to produce resolution.

The use of mediation as an effective and efficient means of resolving cases has been recognized by the Ministry of Attorney General for Ontario, which is about to implement a mandatory mediation programme for civil cases, excluding family law matters. The programme is founded on the principle that “Mediation usually leads to quicker resolution of cases and savings of both time and money”, and will provide individuals and businesses involved in civil disputes, with an alternative method to the traditional court process for resolving their disputes.³²⁴ The programme is expected to begin in January 1999 in Toronto and the Regional Municipality of Ottawa-Carleton and is expected to expand throughout Ontario over the next several years.³²⁵ Mediation has been recognized by stakeholders in the civil litigation process as “a simpler, faster process that helps business avoid the red tape of litigation and gets early resolution of disputes...” and it is anticipated that “it could save Ontario companies millions of dollars in legal fees [...]”.³²⁶

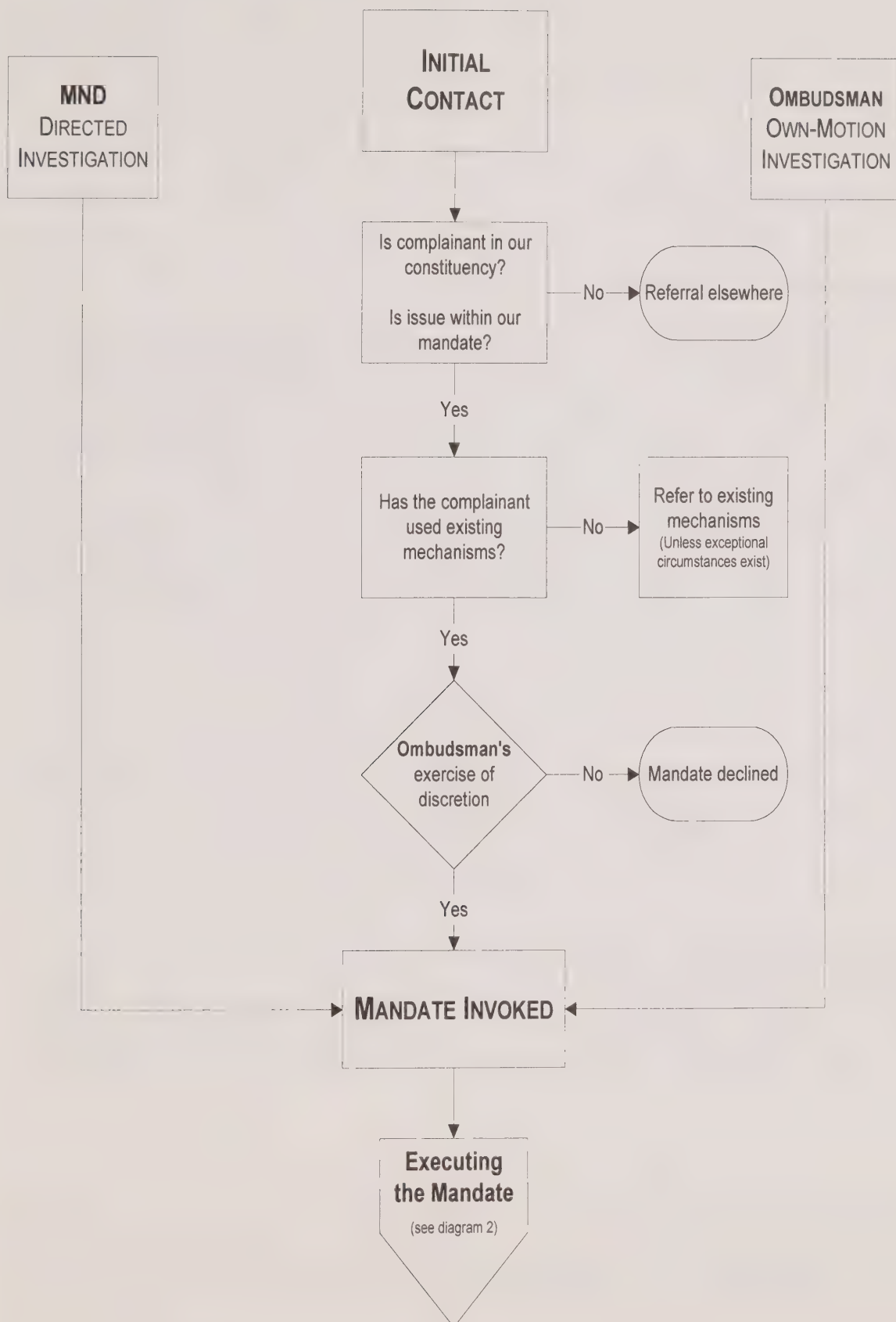
An overview of the process of invoking the mandate is outlined in the flow chart on the following page:

³²⁴ Ministry of the Attorney General of Ontario, *Fact Sheet*, “Ontario’s Mandatory Mediation Programme to begin in Ottawa and Toronto, January 1999”.

³²⁵ *Ibid.* A pilot mediation project at the Alternative Dispute Resolution Office in Ottawa, initiated in 1997 has resulted in 66 percent of cases settling within 60 days after mediation. In Toronto, 70 percent of lawyers and parties who participated in a similar project, believed that cases would have settled at a higher cost if they had not been referred to mediation.

³²⁶ Ms. Catherine Swift, President of the Canadian Federation of Independent Business, quoted in Ministry of the Attorney General of Ontario, *Fact Sheet*, *supra*, note 324.

Diagram 1 - The Mandate



INVESTIGATIONS

The power of investigating is perhaps the greatest and most essential power an Ombudsman has.³²⁷

NEED FOR INVESTIGATIVE POWERS

Fact-Finding

Inevitably, there will be cases where informal mediation, venting, coaching, reframing, giving options, collegiality and other low-key methods will be insufficient to resolve a problem. In those situations, we need to gather the facts (investigate), and craft meaningful solutions based on those facts. To do that, my Office requires written and clear powers to gather these facts. As is clear from the analysis of various Ombudsman's models elsewhere in this report, virtually all effective and credible Ombudsmen Offices possess investigative powers. All military Ombudsmen that we are aware of possess investigative powers.

There is no doubt that the persuasive abilities, the informal collegiality and the goodwill of the Ombudsman are important in fostering solid results. Good mediating skills are an asset. But often the mediator will be successful because of the consequences that will follow for one or both parties should he or she be unsuccessful in resolving a matter. It became very clear that the Ombudsman needs to have at his or her disposal a solid foundation of powers and procedures that give the Office the authority necessary to expedite resolution. Collegiality, and all the other tools in the TOA model, will be rendered ineffective without the existence of clear authorities outlining the responsibilities and powers of all parties, including the consequences of failing to achieve resolution using these means.

³²⁷ Mr. Gordon Earle, former Ombudsman, Province of Manitoba, *The Ombudsman - An Effective Recourse for Citizens?: Occasional Paper #49*, International Ombudsman Institute, January 1994.

A successful Ombudsman will operate under an umbrella which will provide him or her with authority, credibility and a wide spectrum of tools that will foster fruitful and results-oriented solutions.

The need for investigative powers is most clearly evident from the task you have given me to deal with systemic injustices. The investigation of systemic issues requires far different tools than those available from, for example, the “Between Us” model. Dealing with alleged systemic injustices requires painstaking investigation into policies and their application. The goal is obviously to ascertain whether or not a given policy or practice is unfair, and, if it is, to advance practical recommendations to solve the problem. For example, in 1994 the Official Languages Commissioner (OLC) conducted an investigation into the provision of French language services at CFB Moose Jaw. The investigation was initiated as the result of a complaint in February 1994, and got underway in April 1994. The initial complaint mushroomed into several, all relating to language issues. Two investigators were assigned and completed a detailed fifty page report which included comparisons of language services at other CF establishments.³²⁸ One of the investigators was engaged virtually full time for a year on the investigation.³²⁹ A draft report with recommendations was supplied to the DND for comment. The DND, obviously recognizing the absolute need for thorough investigation in these cases, critiqued one of the findings (provision of medical services) because the report addressed the issue “in a somewhat incomplete fashion.”³³⁰ Eventually, and after much discussion with the OLC, the DND introduced policy changes based on the recommendations. Ultimately, the whole process took over two years.

The Federal Court of Canada, in a recent decision, which found that a CHRC investigative report was biased for omitting relevant material information, commented on the importance of fair and thorough investigations:

³²⁸ *Special Investigation Report Concerning Six Complaints at CFB Moose Jaw*, Saskatchewan, Office of the Commissioner of Official Languages, October 1996.

³²⁹ Meeting with Office of Official Languages, August 18, 1998.

³³⁰ *Special Investigation Report Concerning Six Complaints at CFB Moose Jaw*, *supra*, note 328.

In essence, the investigator must collect the information which will provide an adequate and fair basis for a particular case and which will in turn allow the Commission to balance all the interests at stake and decide on the next step. No relevant facts should be left out. Omissions, particularly, when the information is damaging to the Complainant's position, only result in casting serious doubts on the neutrality of the investigator.³³¹

The fact-finding process is to be considered one of the most crucial steps in an Ombudsman's work. The facts of a case provide the foundation or pillars for the Ombudsman's recommendations. Because an Ombudsman does not possess any executive powers, his ability to achieve fairness is dependent upon the strength and credibility of his recommendations. Criticism of investigations as flawed or incomplete, lead to questioning of the strength and credibility of the Ombudsman's recommendations and will render the office ineffective. My Office requires the investigative tools to establish a fact-finding process which satisfies the conditions of "neutrality and thoroughness".³³² As was noted in the Auditor General's report on the CHRC, clear and defined investigative standards are essential to ensuring a credible and fair review process.³³³ In the case of the CHRC, the Auditor General recommended that the government identify and present an integrated set of measures to improve the effectiveness of addressing human rights complaints, including ensuring that specific standards are established and followed, to safeguard the reliability, impartiality and transparency of the **investigation**, conciliation and decision-making process.³³⁴ (Emphasis added)

Further, as noted in the supporting documentation to Bill C-25, I have a mandate to deal with the oversight and review of systemic issues arising out of the redress of grievance and military justice systems.³³⁵ As an overseer of these newly formed organizations, I will be responsible for ensuring these systems are working equitably. It is only appropriate that my

³³¹ *Canadian Broadcasting Corp. v. Paul*, [1998] (F.C.C. Trial Division) 1823, as per Tremblay-Lamer, J. at para. 63.

³³² *Ibid.* at para. 59.

³³³ *Report of the Auditor General*, *supra*, note 139 at para. 10.75.

³³⁴ *Ibid.* at para. 10.123.

³³⁵ *Amendments to the National Defence Act, Issue Papers, Issue Paper #8, Summary at page 2.*

Office is invested with no less authority nor fewer tools than the other channels or mechanisms that form part of the organization I am mandated to oversee.

There are other compelling reasons to vest this Office with investigative powers. As noted above under the heading “MND Directed Investigations”, once my Office becomes operational, it will reduce or eliminate the need, created by the absence of an Ombudsman, to retain external investigators to examine certain high-profile and sensitive cases that remain unresolved in spite having been dealt with by existing internal investigative mechanisms. This not only offers an excellent opportunity for cost savings, but also refutes the perception of some that these investigations are somehow influenced by, or beholden to the chain of command. We have been told that investigations done by contracted former civilian police officers or others are perceived to lack credibility because there is an impression that the investigators are hand-picked and would be reluctant to bite the hand that feeds him or her. The establishment of my Office, as an independent overseer outside of the chain of command, will do much to negate this perception, provided we are given the tools to do the job effectively.

Once again, I am fully cognizant of the deep-rooted fear felt by some high-ranking officers that the existence of any authority within my Office could seriously undermine the authority of the chain of command.³³⁶ We heard many comments during the consultation process about the perceived threat, from both within NDHQ and at the local level.

The Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces also noted this fear among some within the CF and added that "these misgivings are not likely to disappear spontaneously".³³⁷

³³⁶ This concern was made clear in a memo from the then Commander MARLANT dated September 26, 1996 in which he comments that: “By its very nature an Organizational Ombudsman will become recognized as a means of circumventing the chain of command”. He adds that he “does not concur with the Ombudsman organization to the extent proposed.”

³³⁷ Minister's Monitoring Committee on change in the Department of National Defence and the Canadian Forces - *Interim Report* - 1998.

Concerns about the relationship between the Ombudsman and the chain of command were made very clear during a presentation on implementing a CF Organizational Ombudsman to the Personnel Policy Board (PPB) as far back as on October 9, 1996, during which various models were discussed. There was obvious anxiety from several quarters that the advent of the Ombudsman could gravely weaken the chain of command and the divisional system. The presenter addressed these concerns in two ways. Firstly, he discussed the rationale behind choosing an Organizational Ombudsman over other options, such as an Inspector General, external Ombudsman, military union or an external review committee, because that option was “judged to be significantly less intrusive on the chain of command than the alternatives [...]”.³³⁸

Secondly, the presenter confronted the widespread trepidation about the impact of an Ombudsman with the following, and in my opinion compelling, words:

In the first place, the contrasting example and experience of some of the world’s pre-eminent professional military forces the Americans with their IG system, the Germans and Australians with their Ombudsman, the Israelis with their complaints commissioner suggest that neither professionalism nor operational effectiveness would be adversely effected. Second, if we are going to preach a new culture of openness and accountability – whether under the banner of D2000, the Defence Ethics Programme, MCCRT, or any other renewal programme - then we should be prepared to demonstrate our commitment to these policy principles in our accountability practices. **Even the chain of command must be accountable in some public way for its performance. Third, it must be emphasized that that the Ombudsman is not an advocate for service members, but a neutral third party, so if the chain of command is functioning fairly - as a matter of fact as well as a matter of faith - then the Ombudsman can only reinforce its authority. In the worst case, if the presence of an independent Ombudsman hovering in the wings has the effect of reminding some leaders that they may be held to account, then such influence may be healthy.**³³⁹ (Emphasis added)

Nonetheless, there is still today widespread acknowledgement by senior ranks that the choice of an Organizational Ombudsman was the least intrusive option open, other than doing nothing at all. As a Senior Officer involved in the set-up of the Office explained:

³³⁸ *Briefing Notes to PPB, supra*, note 27.

³³⁹ *Ibid.* at pages 8-9 (slide presentation).

We were looking for a model that would be acceptable to our senior management. The goal was to establish an Ombudsman that would not interfere with the chain of command. We didn't want an Inspector General because it interferes with the chain of command. It was decided to take the organizational [Ombudsman] because it would not interfere in the chain of command. That was the biggest fear.³⁴⁰

In my view, these fears from some in the chain of command are ill-founded, as experience in other jurisdictions clearly shows. The Israeli Defence Attaché in Washington DC rejected the contention that the existence of an Ombudsman is disruptive to the chain of command. "We heard those arguments when we first started this institution (the Soldiers' Complaints Commissioner). You will always have some commanders who say that, but as a whole we believe that it is positive."³⁴¹ His views mirror those of the German Defence Attaché in Ottawa, who also has first hand experience of co-existing with an effective Ombudsman. The German Defence Attaché noted that the relationship between the German Parliamentary Commissioner (Ombudsman) and the chain of command depended on whether "she was investigating you or not". He advised that the Ombudsman does not interfere with the chain of command, but does make individuals a little more careful in their dealings with the people they are commanding. He stated "[...] if you do things correctly you should not have any problems with the Ombudsman (but) if you were to act in any way contrary to the rights of the individual, you'd better think twice".³⁴²

The Ombudsman is neutral and impartial. I expect, as well, that in many cases, my Office may, in fact, validate decisions made by the chain of command.³⁴³ This does not mean that my Office will be a puppet of the chain of command or its senior officers. If it is, or is perceived to be, then the Office will not be credible in the eyes of its stakeholders. The Ombudsman may assist the chain of command to do its job; he is not here to replace it, nor to

³⁴⁰ Meeting with DPCR staff member, November 8, 1998.

³⁴¹ Major-General Livne, National Post, November 24, 1998 at page A16. This was also confirmed in a telephone interview by a member of my staff, on November 27, 1998.

³⁴² Meeting with Lt.-Kol. Schoof, Embassy of the Federal Republic of Germany, Ottawa, December 7, 1998.

³⁴³ As Brig.-Gen. (ret'd) Doshen wrote in the *Doshen Paper # 2*, *supra*, note 26 at page 15 "[...] when the CF Ombudsman supports or reinforces organizational policies and procedures that are fair and equitable, the Ombudsman function serves to strengthen the credibility of the chain of command."

excuse it, nor to advocate for it. The same principles of neutrality and impartiality apply equally to the Ombudsman's relationship with any other party, including a complainant.

Feedback from the Consultation

As noted elsewhere in this report, we spoke to, and received input from, thousands of DND/CF members and their families during the consultation process. There was little dispute in one area. Wherever we went, whomever we listened to, the voice of the members was virtually unanimous. The Ombudsman's Office is doomed to insignificance and ultimate failure unless it has the ability to independently establish all the facts relating to a complaint or issue. Indeed, there was an almost universal assumption that the Office would, as a matter of course, have full investigative powers. The overwhelming consensus was that we must have the powers to do the job, matched only by cynicism that we would not be given those tools because the last thing that senior management wanted was an effective watchdog. There were very few instances where someone seriously argued that under no circumstances should the Office have any investigative capacity.

Notable quotes on this subject from our consultation included:

- You'll be a joke if you don't have investigative powers. (*Meeting with Professor Edward Ratushny, Q.C., University of Ottawa Law Faculty, October 19, 1998*)³⁴⁴
- The objectives of your office should be [... to] have the full and proper authority to investigate and not to get stonewalled. (*Meeting with Professor Edward Ratushny, Q.C., University of Ottawa Law Faculty, October 19, 1998*)
- You should have the investigative powers available. (*Telephone interview with NCM at Fort Frontenac, August 26, 1998*)
- You would need the following powers, access to documents, subpoena power, evidence under oath, need to have authority to get information from both the military and civilian and also outside agencies dealing with DND/CF. (*Meeting with Union Representatives, Edmonton. September 1, 1998*)
- *Il faut que tu puisses avoir le pouvoir d'enquêter de ta propre initiative.* (*Meeting with The Honourable Mr. Justice Gilles Lévesque, September 30, 1998*)
- Ombudsman should have investigative abilities. (*Lunch with Brigade Officers, Edmonton September 1, 1998*)

³⁴⁴ Professor Ratushny is a Professor of Law at the University of Ottawa. He is an acknowledged expert in public law and civil liberties. He is a former Special Advisor to two Ministers of Justice and has acted as a consultant to numerous federal and provincial agencies. He most recently examined and reported on a matter arising from the APEC inquiry.

- Investigate in the field, get all sides of the story. (*Meeting at Officers Mess, LFWATC, Wainwright September 3, 1998*)
- If you have no teeth, you are no good; just another waste of DND dollars. (*Meeting with Senior NCM's, Trenton, September 8, 1998*)
- You will need to have the tools to look at both sides of the issues and to make proper, impartial recommendations. (*Meeting with 2 RCR Officers and NCMs at Velika Kladusa, Bosnia, November 11, 1998*)
- You cannot use MPs in doing an investigation, you need independent investigators. (*Meeting with 1 AMS, Cold Lake, September 15, 1998*)
- Yes, you need to look into things, you don't want bogus claims. (*Meeting with 1 AMS, Cold Lake, September 15, 1998*)
- No problem with Ombudsman having investigative powers. If our guys do their job right, nothing to fear. (*Meeting with Military Police, Cold Lake, September 15, 1998*)
- You need investigative powers - administrative investigative powers, but not criminal investigative powers. (*Meeting at Warrant Officers and Sergeants Mess, September 15, 1998*)
- With regard to your investigative powers, if your investigators are not outside the chain of command, then it is pointless to do an investigation since they are not independent. (*Meeting at Warrant Officers and Sergeants Mess, September 15, 1998*)
- Unless the Ombudsman is given appropriate power or authority, (the changes that have been made to attempt to restore integrity in the system) are completely useless. It is my opinion that the Ombudsman's office should have complete authority and investigative powers to address any issues and concerns relayed to it by military personnel or civilians. (*Letter from Ms. Christina Wheeler, widow of MCpl. Rick Wheeler*)
- The military should not investigate itself. A neutral third party, such as the Ombudsman or RCMP should be investigating. (*Ex-Member who spoke to the Ombudsman about an alleged series of sexual assaults when she was serving in military*)
- The investigative function is absolutely indispensable. Expert investigations produce information regarding the individual and systemic causes of complaints and the recommendations of this office are rooted in this information. (*Ms. Virginia Menze, City of Winnipeg Ombudsman, Annual Report 1997-1998*)
- You've got to have teeth. (*Meeting with 402 Squadron Personnel, Winnipeg, September 16, 1998*)
- If your investigators can be shut down at any point, you'll be useless. You'll have no teeth. (*Meeting with 402 Squadron Personnel, Winnipeg, September 16, 1998*)
- You need investigative authority. (*Leading Seaman, HMCS TORONTO, September 22, 1998*)
- We think you would need complete authority to obtain documents and information in order to do your investigation. (*Meeting, at CFSAL, CFB Borden, September 28, 1998*)

- The last thing we want is another ineffective process. (*Meeting with Dockyard Workers, CFB Halifax, October 26, 1998*)
- [You] need the power to look into things, to investigate, to understand both sides of an issue in order for your recommendations to have credibility. (*Lt.-Kol. Schoof, German Defence Attaché, Ottawa, December 7, 1998*)
- You must have the authority to access information and to speak to people. (*Meeting with Senior Officer, LFAA Headquarters, Halifax, October 28, 1998*)
- You need to have investigative authority; you must be able to get full access to people and documents which are required to get the full story. You should have the power to re-open NIS and MP investigations and to see if they were done correctly. I know of a few botched investigations, which watered down the facts and sent it back to the wing. (*Meeting with members at RA Park, LFAA Headquarters, Halifax, October 28, 1998*)
- You need to have teeth, to have investigative power and get things done. (*Meeting with HT 406 12 Wing, Shearwater, October 27, 1998*)
- You need to prove to people that you have teeth. That will give you credibility. (*Meeting with HT 406 12 Wing, Shearwater, October 27, 1998*)
- You will need investigative authority to look into issues and be able to get both sides before making recommendations. (*Meeting with Junior Ranks, CFB Gagetown, October 29, 1998*)
- (You) need to have the power to investigate. Need to investigate to get facts and the highest investigative standards, to have credibility. Need professionally and formally trained investigators. If they investigate and rule against the soldier, explain him/her in person. (*Meeting with Officers, CFB Gagetown, October, 29 1998*)
- It is extremely important to be able to fact find, to look into. (*Meeting with Major Kennedy (US Army IG office) and others, Brussels, November 5, 1998*)
- *Absolument besoin de pouvoirs d'enquêtes - carte blanche A à Z.* (*Meeting with Military and Civilian Members, Geilenkirchen, Germany, November 6, 1998*)
- Definitely need mandate to investigate. You need the authority to go everywhere, look at everything. You must have full access, *carte blanche*. You must have recognized investigative authority. (*Meeting with Military and Civilian Members, Geilenkirchen, Germany, November 6, 1998*)
- You'll need the power to investigate - you'll want to compel individuals to forward information and documents. (*Meeting with Me Daniel Jacoby, Q.C., Protecteur du citoyen du Québec, August 19, 1998*)
- Investigations are important, but not the only tool. (*Meeting with Mr. Douglas Ruck, Ombudsman, Province of Nova Scotia, October 28, 1998*)
- Need power to investigate, speak to anyone uncurtailed... (*Meeting with Ms. Dulcie McCallum, Ombudsman, Province of British Columbia, September 2, 1998*)
- If the existing channels cannot handle the problem or do not deal well with it, you want to have the powers to investigate. (*Meeting with Military Police Officers, NDHQ, August 28, 1998*)

- It is very important to have impartial experts doing the investigations so there are no complaints about the investigations. *(Meeting with Mr. Gilbert Langelier, Assistant Director General, Investigations Branch, and Mr. Anthony Kay, Investigator, Office of the Commissioner of Official Languages, August 18, 1998)*
- It is important to have the power to tell institutions that are not cooperating that you will subpoena them. Once they realize you have the power to subpoena they normally send over the requested information. If you don't have the power to subpoena, you will be seen as lame. *(Meeting with Mr. Gilbert Langelier, Assistant Director General, Investigations Branch, and Mr. Anthony Kay, Investigator, Office of the Commissioner of Official Languages, August 18, 1998)*
- We do not have a division of complaints into formal or informal investigations; the *Official Languages Act* obliges us to investigate each complaint. *(Meeting with Mr. Gilbert Langelier, Assistant Director General, Investigations Branch, and Mr. Anthony Kay, Investigator, Office of the Commissioner of Official Languages, August 18, 1998)*
- You should have investigative powers, such as subpoena, should have unimpeded access to people and documents; should have many tools in your box, although (you) don't have to use (them), you know it's there. *(Meeting with Professor Douglas Bland, Chair of Defence Management Studies Programme, Queens University, August 26, 1998)*
- It is important to have investigative authority. *(Telephone Interview with Major-General Livne, Israeli Military Attaché, Washington D.C., by a member of my staff, November 27, 1998)*
- In your case, the public is expecting you to take control of your investigations; to do this you need the tools. You don't want to use them but need to have them, if not you will be ineffective. If you end up being a secondary source investigating the investigations done by MPs or NIS, you will lose all credibility. You must have the power to go to the bottom of the problem and do your own investigations. You cannot only review the investigations which were done. *(Meeting with Me Simon Noël, Q.C., September 22, 1998)*
- In case you missed it, your own Ombudsman was asking for that right to launch investigations on his own say so; yesterday when he said empower the Ombudsman and you shall be empowered. I'm not here to make a pitch for Mr. Marin but I do think it's fair to say that if he's not seen as credible, he will be ignored by the press. *(Mr. Christopher Thomas, Text of Speech to Defence Ethics Conference, October 21, 1998)*
- You need powers to investigate and see all sides of the story. You need formal powers of investigation. If you don't get the authority, don't bother doing it. You must have the authority. *(Meeting with Mr. Bill Wheeler, relative of the late MCpl. Rick Wheeler, October 29, 1998.)*

The consensus expressed in the field is reflected in some of the documentation NDHQ supplied to me regarding the setting up of this Office. I particularly noted Lt.-Gen. Dallaire's comment that:

[A]n office that is not empowered to investigate or mediate does not perform Ombudsmanry functions but rather an information and referral service only. The mission of the ombudsman is to assist in complaint resolution by a variety of means, including informal investigations, inquiry and mediation. To deny the Ombudsman's office any responsibility to investigate, make inquiries or mediate is to gut the function.³⁴⁵

Informal vs. Formal Investigations

Several documents obtained from NDHQ as background material for my Office, advocate that our investigative powers be limited to that of an "informal investigation", however the term was not defined other than that it "means a written report is not produced."³⁴⁶ More ominously, the term could infer that the investigative process is casual, less thorough; few if any records are kept; or the consequences are somehow less serious than in a "formal" investigation. A cursory examination of the cases that have already been submitted to my Office make it clear that this is an impractical, indeed, dangerous approach to doing business. It must be noted that the Federal Court of Canada has recently reiterated the importance of investigations being conducted in a "neutral and **thorough**" fashion.³⁴⁷ (Emphasis added) Many of the issues raised with my Office so far are complex and the parties are often adversarial. Many of the cases submitted to my Office will involve alleged violations of the fundamental human rights of individuals including violations of sexual integrity and sexual harassment. The Auditor General in his report on the CHRC, commented that investigations, which form the basis for decisions involving fundamental human rights, must be "rigorous" and clear standards should be followed for the conduct of such investigations.³⁴⁸ I believe that sound practice and fairness dictates that investigators must keep meticulous records. Meaningful and accountable solutions require a demonstrable factual basis. It is the common practice amongst empowered organizational and military Ombudsmen to conduct investigations in a thorough fashion, and justify their conclusions with a written report. As noted above, the DND was the first to challenge the OLC's

³⁴⁵ Implementation of MND's Recommendation DND/CF Organizational Ombudsman (National Office) Minute (4) ADM (Per) page 2, clause 6. Document signed by Lt.-Gen. Dallaire, May 11, 1997.

³⁴⁶ *Ibid.*

³⁴⁷ *Canadian Broadcasting Corporation v. Paul*, *supra*, note 331 at para. 12.

³⁴⁸ *Report of the Auditor General*, *supra*, note 139 at paras. 10.63 and 10.74.

recommendations when their investigators in DND's opinion, investigated in a less than thorough manner.

In my opinion, there is no such thing as an "informal investigation". An investigation is an investigation. It must be done with professionalism and integrity, and ultimately be able to withstand scrutiny from all parties. It would be manifestly unjust to all concerned if my Office was obliged to investigate issues without the ability to produce a written report to justify my findings. It would severely impact the accountability of my Office. The whole, flawed, concept is diametrically opposed to the principles of openness and natural justice, which are so fundamental to the credibility of the Office. Not completing a thorough, objective investigation is simply wrong. Not producing a report at the end of an investigation exacerbates the problem. Providing the factual foundation and the reasons behind a decision is a crucial aspect of fairness and natural justice. For example, the Auditor General in his report on the CHRC, highlighted that stakeholders in the CHRC process were concerned that Commissioners were not providing sufficient information on the reasons for their decisions. The report recommended that Parliament be provided with specific measures to require clear, complete and timely disclosure of reasons for decisions.³⁴⁹

There also may be serious legal implications in either not keeping, or destroying records generated by the Office, particularly in light of impending amendments to the *Access to Information Act*, which are previously dealt with in some detail elsewhere in this Report.

There were some suggestions that I rely on investigations completed by others within the DND/CF upon which to base my recommendations, and that I confine my inquiries to an existing paper trail. While there may be some merit in using these investigations as a starting point, I am not otherwise persuaded by this argument. My tenure as Director at the Province of Ontario, Ministry of the Attorney General, Special Investigations Unit taught me that investigations completed by internal agencies are sometimes an inappropriate basis to make a decision, for several reasons. They rarely exhaustively address issues germane to the matters that the overseer is interested in. The process is cumbersome, time-consuming, and therefore

³⁴⁹ *Ibid.* at paras. 10.58 and 10.123.

expensive. Further, the investigation often has little credibility with some stakeholders, even when done in good faith, because of perceptions of conflict of interest.

I should therefore be allowed to independently verify the investigative work product generated in any given situation, as well as having the option to gather new facts.

Even if we ignore the opinions of the vast majority of our constituents, and an overwhelming proportion of outside observers, there are clearly serious dangers inherent in not giving the Ombudsman the investigative powers he or she may need. For example, if the Office is not empowered to investigate, it may become a magnet for vexatious or frivolous complaints. If we are prevented from establishing all the facts using accepted investigative techniques, we would likely inadvertently become an advocate for whomever came to us first, because we would not be able to establish both sides of the story in a methodical and fair manner. If that happened, our credibility and integrity would be fatally compromised.

The Ombudsman Association (TOA) style Ombudsman at DFAIT alluded to this problem during the consultation process. She told us that it was crucial to get all sides of the story, but she had problems ensuring she got the full picture. She states that:

When people come to see you they don't necessarily give you the whole story; they give you the bits and pieces they find relevant. Also there is the danger they are unconsciously trying to manipulate you.³⁵⁰

As you have made so clear, an Ombudsman must be neutral and impartial. He or she cannot be an advocate and must operate as far as possible in an impartial and non-adversarial way.

³⁵⁰ Meeting with Ms. Isabelle Massip, DFAIT Ombudsman, August 18, 1998.

In order to establish all the facts, we require unimpeded and immediate access to people, documents and places within the organization at any stage when we intervene in an issue. We also require full and immediate co-operation from all members, in order to perform our tasks in a fair, thorough and timely fashion. This co-operation is the key to a successful office, and I am grateful for, and welcome, your commitment to ensure that I “receive the support and co-operation of all levels of the Department and the Canadian Forces”.³⁵¹ The experience of the CHRC gives a good illustration of how the lack of specific legal authority to compel co-operation during an investigation can lead to a virtual paralysis of the investigation and contribute to significant delays in the review process. Significant delays also result from the Commission not having the legal authority to enforce deadlines. For example, the Commission requests that respondents reply to a complaint within 40 days of notification. The average reply, however, takes 60 days with about 15 percent of respondents taking 90 days or more to reply. In such instances, the Commission’s only recourse is to send additional reminders to provide information.³⁵²

The Auditor General has recommended that Parliament be presented with measures to establish statutory deadlines for the receipt and disclosure of information to and by the Commission.³⁵³

It is also important that my authorities are written down where everyone has access to them and understands, up front, their obligations *vis-à-vis* my Office. The importance of the need for clear defined standards was highlighted by the Auditor General in his review of the CHRC:

³⁵¹ Your letter to me dated September 8, 1998, *supra*, note 242.

³⁵² *Report of the Auditor General, supra*, note 139 at para. 10.44.

³⁵³ *Ibid.* at para. 10.123.

The Commission needs to have clear and required investigation standards that would allow the Commission and others to ensure accountability and transparency in the investigation and decision process. In addition, clear standards are needed for the disclosure of information to complainants and respondents during investigations and on decisions. Such standards would also help increase the confidence of stakeholders in the Commission. Further, they would help the Commission manage risks arising from a complex and litigious environment where investigations may last on average two years and where there is a high turnover in staff, requiring the Commission to rely on inexperienced investigators.³⁵⁴

Sooner or later, there will be an inevitable conflict over exactly what and how my Office can investigate. Occasionally, these issues take considerable time to resolve, thereby bogging down the process and potentially delaying resolution of the complaint itself.³⁵⁵ This need is particularly acute because we operate in a hierarchical military environment, where written rules and regulations govern most aspects of the DND/CF members' working lives. Ultimately, it is essential for all parties to know exactly what their responsibilities are in respect of this office, as well as vice versa.

It is abundantly clear that an effective Ombudsman must have the power to investigate, if necessary, in any manner he or she sees fit.³⁵⁶ That is not to say that possession of powers means they will be used. Most effective Ombudsmen's offices operate on the principle of "speaking softly but having a big stick". The powers themselves are rarely, if ever, used. For example, *Le Protecteur du citoyen du Québec* has sweeping investigative powers, yet he has never had to invoke them.³⁵⁷ The Concordia University Ombudsman rarely uses the powers granted to her. The Norwegian Armed Forces Ombudsman, who has been in existence since 1952, has never had to use his power to report to the *Storting* if he

³⁵⁴ *Ibid.* at para. 10.75 and Recommendation at para. 10.123.

³⁵⁵ See: for example: *Special Investigation Report and Concerning Six Complaints at CFB Moose Jaw*, *supra*, note 328. The investigation was prolonged because of a dispute over jurisdiction between DND and the Commissioner.

³⁵⁶ Larry Guillot, *Ombudsman's Investigative Procedures: A General Guide for use by Individual Offices, Occasional Paper No. 5*, International Ombudsman Institute, August 1979 writes at page 1 that "the Ombudsman's investigation is the systematic, minute and thorough attempt to learn all the facts about a complaint, a possible pattern of problems and the issue behind it. Indeed, investigation is the backbone of complaint handling by the Ombudsman. Once a complaint is received, nothing can be resolved until there has been a gathering of the facts and information from all the people and things involved, along with ascertaining the relevant laws, policies, procedures and practices normative to the fact."

fails to resolve an issue with the Minister of Defence.³⁵⁷ However, each and every empowered Ombudsman my team and I met with emphasized that the fact that their powers existed was crucial in ensuring that they were able to fulfil their mandates.

Furthermore, I report directly to you. I believe that you are entitled to the highest quality work product from my Office. This product is likely to be subject to considerable scrutiny by all parties involved in the issue, including the public and the media. However, I cannot guarantee the highest quality work product without having the proper investigative tools at my disposal to uncover the truth.

RECOMMENDATIONS

I therefore recommend that:

The Ombudsman may investigate any matter in any manner he or she deems fit.

All members of the DND/CF shall co-operate fully with the Ombudsman, who may compel any person to give any information relating to the matter being investigated by the Ombudsman, and to furnish him or her forthwith with any such information, in any form requested, including under oath, if the Ombudsman so determines; and to produce forthwith any documents, objects or things which in the Ombudsman's opinion relate to any such matter and which may be in the possession or under the control of that person.

Any member who fails to co-operate fully with the Ombudsman's Office, or who fails to abide by the provisions of any regulation created in respect of the Office, shall be subject to severe sanction.

INVESTIGATIVE CONDUCT AND ACCOUNTABILITY

The Ombudsman must be as accountable as those he or she oversees. This Office will conduct its investigations impartially, and with the highest standards of integrity and professionalism. We will respect the rights of all involved parties.

³⁵⁷ Meeting with Me Daniel Jacoby, Q.C., Protecteur du citoyen du Québec, August 19, 1998.

³⁵⁸ Frank Stacey, *"Ombudsman Compared"* Oxford, 1978 at page 44. We are not aware if this power has been exercised since 1978.

I therefore recommend that:

The Ombudsman's Office will respect the principles of natural justice and procedural fairness.

NOTIFICATION OF INVESTIGATION

The Ombudsman is neutral. It is only fair that any organization or individual complained about has an opportunity to respond to the complaint. We must get all sides of the story, particularly so if the Ombudsman is considering suggesting recommendations that may imply criticism of the action or omission of any individual or agency.

I therefore recommend that:

Absent special circumstances, the Ombudsman will notify all involved parties of his or her intention to investigate any matter that falls within his or her mandate, and give them the opportunity to respond.

TURNAROUND TIME

It currently takes the Ontario Ombudsman three to nine months to complete investigations, depending on the complexity of the case. The CHRC has also experienced lengthy delays. The federal Auditor General's report found that the Commission in practice took an average of about ten months to complete initial investigations and in about 26 percent of cases, it took over one year.³⁵⁹

Many of the complaints we heard during the consultations involve chronic delays within existing redress mechanisms. I am determined that we will do everything we can to avoid falling into the trap of endless delays, snail pace investigations and slow response times. As you are aware, during my tenure as Director at the Province of Ontario, Ministry of the Attorney General Special Investigations Unit, I instituted a successful investigation policy, which resulted in the vast majority of our investigations, some of which were

fatalities and allegations of serious sexual assault, being completed within 30 days of the SIU being notified of the incident.

The federal Auditor General's report on the CHRC emphasized the need for defined standards of performance delivery:

The information the Commission provides on its management of complaints of discrimination could be significantly improved. The commission provides only summary information on the number of complaints filed and their disposition. It could improve its performance by providing information on the delivery of services against **defined standards**.³⁶⁰ (Emphasis added)

I see no reason why we cannot self-impose deadlines in the majority of cases that we look into, subject to caseloads, resources and immediate co-operation from all involved parties. However, given the size and dispersed nature of the organization, it may be prudent to extend the completion deadline to 60 days. I cannot emphasize strongly enough that to achieve this goal, we must have full and immediate cooperation from all members.

I therefore recommend that:

Subject to full co-operation from all parties, the Ombudsman shall aim to complete investigations within 60 days of invoking his or her mandate.

ACCESS TO PERSONNEL FILES

To facilitate and expedite the investigation of complaints, my Office should have direct and immediate access to all DND/CF personnel files. This will obviate the need to request items on a piecemeal basis and obviously will be essential in ensuring that we can complete our work in a timely and efficient manner. The IDF Soldiers' Complaint Commissioner has 'real time' computer access to all such IDF files, which, he advises me, is very important in enabling him to expedite his investigations.³⁶¹

³⁵⁹ *Report of the Auditor General, supra*, note 139.

³⁶⁰ *Ibid.* at para. 10.94, and see also Recommendations at para. 10.123.

³⁶¹ Meeting with Brig.-Gen. (ret'd) Uzi Levtzur, IDF Soldier's Complaints Commissioner, November 9, 1998.

I therefore recommend that:

The Ombudsman's Office has immediate and direct access to all personnel records held by the DND/CF.

FINDING OF FACT

Complaint is Not Justified

Once the Ombudsman has gathered all the relevant facts, he or she will make a determination as to whether the complaint is justified. Based on the experience of other empowered offices, I anticipate that the majority of investigations will conclude that the system is justified in treating the complainant the way it did.³⁶² If this is the case, I will advise both the complainant and the person or agency complained about accordingly, as indeed I will do at each stage throughout the process outlined below. Data from cases that fall into this category will be included in my Annual Report, with all identifiers expunged, to protect confidentiality. If the matter is of pressing public interest, the data may be published as part of a special report.

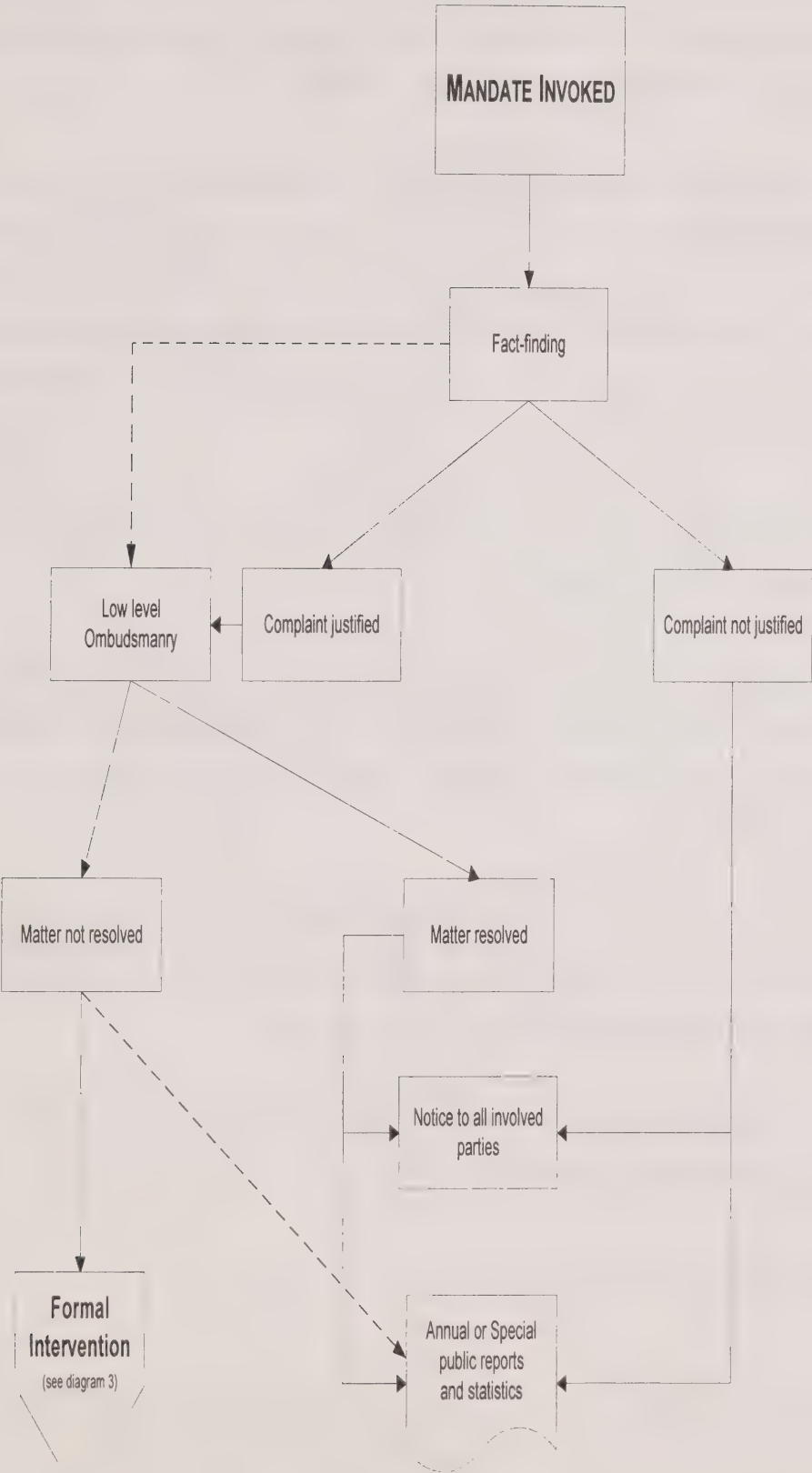
Complaint is Justified

If the facts reveal that the complaint is justified, I will attempt to resolve the matter using all the tools available to me, including informal TOA-style resolution techniques, and access to all levels within the DND/CF. I will of course notify all parties if we successfully resolve an issue at this stage. Data from cases resolved at this stage will be included in my Annual Report, or special report if applicable, with all identifiers expunged.

This process is outlined in the flow chart on the following page.

³⁶² In meeting with various provincial Ombudsmen, we learned that approximately 80 percent of provincial Ombudsmen's investigations result in a finding that supports the agency or individual complained against. This may translate into the military field.

Diagram 2 - Executing the Mandate



We anticipate that the majority of investigations will result in resolution at low levels, without the need to make recommendations to any party.³⁶³ However, some investigations will result in recommendations. In those circumstances, I intend to recommend practical and tangible changes, which will benefit the organization as a whole.

The first step will be to send a letter providing recommendations to the person or agency directly responsible for remedying the situation, and who is in a position to make a decision on the issue. I will attach a reasonable deadline for a substantive response, in order to ensure timeliness. If the Ombudsman's intervention is successful and the person agrees to implement the recommendation(s), the data will be included in my Annual Report, or a special report, as appropriate.

There may be occasions where I do not receive a response from the decision-maker, or the response received is not satisfactory.

If the decision-maker is a member of the DND/CF, I will advise the Chief of Defence Staff (CDS) or Deputy Minister (DM), as appropriate, of my recommendations and request a substantive response with a deadline, in order to give the chain of command a last opportunity to resolve the issue.

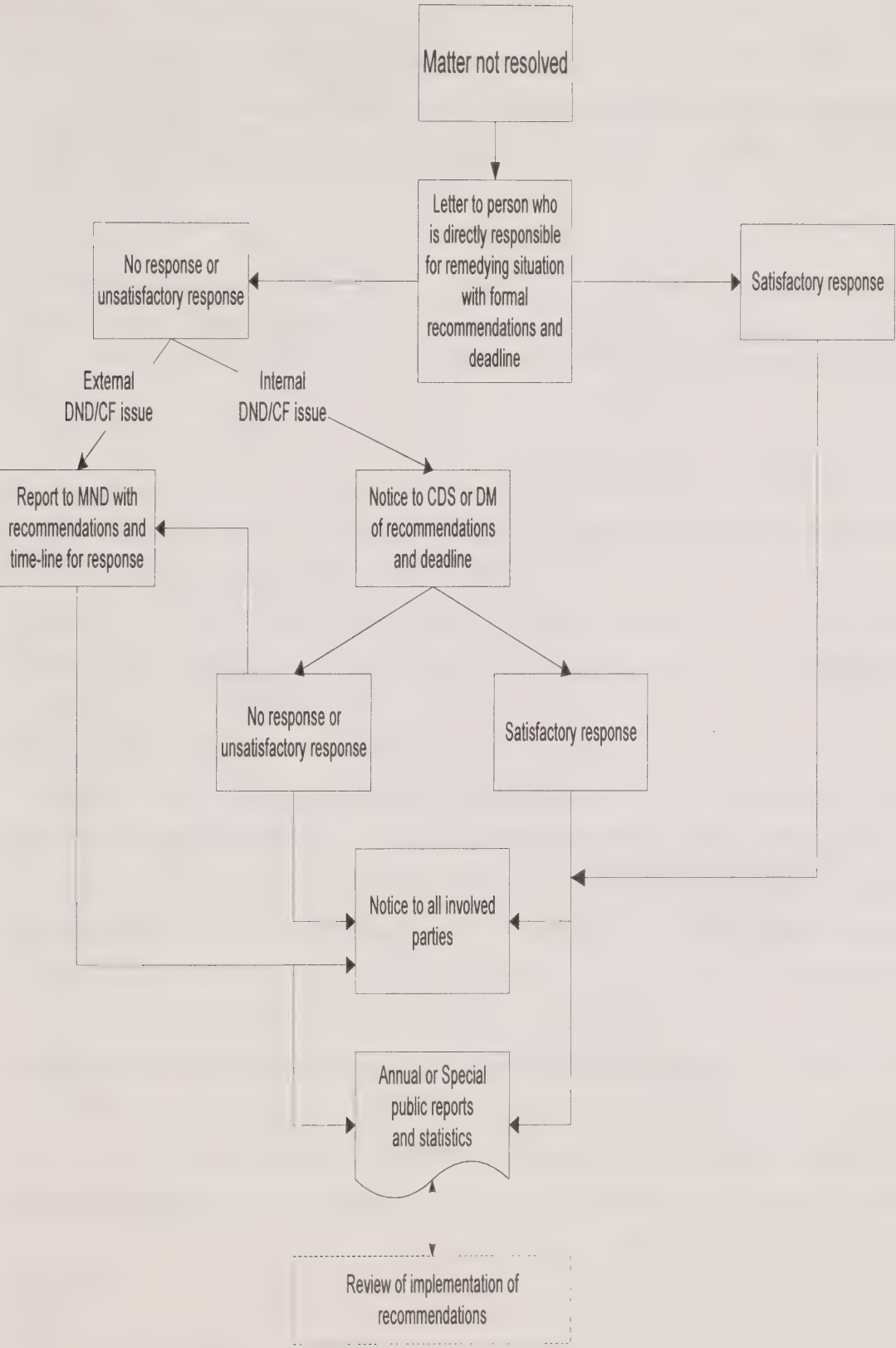
I will report to you in cases where the decision-maker is not from the DND/CF, or where cases are not resolved at the CDS/DM level. My report will include recommendations requesting a substantive response within a designated time frame.

Data from all cases that reach this stage of the process will also be included in my Annual Report, or a special report as appropriate.

The process is outlined in the flow chart on the following page:

³⁶³ *The Manitoba Ombudsman Annual Report 1995*. Of the 758 written complaints received by the Manitoba Ombudsman in 1995, only one resulted in a formal recommendation. The remainder were discontinued, resolved or partially resolved.

Diagram 3 - Formal Intervention



Note: The Ombudsman retains the discretion to make public comment at any time during this process

NOTIFICATION OF ALL PARTIES

In accordance with my commitment to openness and transparency, I intend to keep all parties informed as often and as comprehensively as possible, during and at the conclusion of the process outlined above.

I therefore recommend that:

Absent special circumstances, the Ombudsman will keep all involved parties informed of the progress and disposition of a case.

PROTECTING THE INTEGRITY OF THE INVESTIGATION.

We must guarantee the integrity of the investigative process. While it is important to keep the public as fully informed as possible, one of the fundamental principles of proper investigation is that all information concerning an incident is kept confidential while the evidence gathering process is ongoing, with few exceptions. It is imperative that witness' evidence not be tainted by the premature release of information during an investigation, whether the release is inadvertent or otherwise. Any such disclosure may prove fatal to a full and objective investigation. It is also undesirable to have comments made or opinions expressed in the media before my Office has an opportunity to ascertain all the facts and the DND/CF has an opportunity to respond to any recommendation that I may make. This will also avoid any inference that my Office has been influenced by any comments or opinions expressed in the media.

To this end, it is inappropriate for any party to comment publicly on any matter upon which the Ombudsman has invoked his or her mandate prior to the conclusion of the case, without my express written consent. Once I have invoked my mandate, I should be solely responsible for balancing the needs of the investigation against the right of the public to be informed on matters of public interest.

I therefore recommend:

No member of the DND/CF shall make any public comment on any matter upon which the Ombudsman has invoked his or her mandate, without the Ombudsman's written consent, until the conclusion of the investigation.

PROTECTION FROM REPRISAL

During the course of my consultation, one of the most recurring and predominant concerns by civilian and military members of all rank, has been the issue of retribution, reprisal and the perceived lack of support by peers or by Senior Officers. The basic and legitimate apprehension is that by reaching out to the Ombudsman's office and potentially filing a complaint, retribution will ensue. The underlying assumption is that the complainant will be perceived and labeled as a "whistleblower" or a "troublemaker" or simply, defiant or antagonistic of the existing chain of command. The complainant could, in the process, be subjected to harassment, demotions, censure and even be subjected to a certain degree of persecution.³⁶⁴

Where the identity of a complainant becomes known, all steps must be taken to protect the complainant from any direct or indirect repercussions. This protection should extend to any DND/CF member who assists in the making of a complaint or who assists in an investigation or the resolution of a complaint. Any act of retribution or reprisal against such persons must carry severe consequences against those responsible.³⁶⁵ As I noted in my speech at the 1998 Defence Ethics Conference, such backlash not only stifles growth, in the simplest of terms, it is unethical and must be dealt with severely.

In order to fully ensure that persons who come forward and contact my Office or who cooperate with my Office are protected, my Office must have the power to investigate any

³⁶⁴ See quotes in Chapter 3, specifically under the sub-heading on "Confidentiality", starting at page 96 of this Report.

³⁶⁵ See: Alberta's *Ombudsman Act*, *supra*, note 148, s. 30; British Columbia's *Ombudsman Act*, *supra*, note 148, s. 16. See also: Meeting with Mr. Gilbert Langelier, Assistant Director General, Investigations Branch, Office of the Commissioner of Official Languages.

alleged act of retribution or reprisal against such persons. Any such act of retribution or reprisal should be recognized as a serious act of misconduct with severe penalties attached. An example can be taken from regulation 80 of the Australian Defence Force Regulations, which governs the ADF redress of grievance system and which provides that a member shall not:

- ◆ prevent or dissuade, or attempt to prevent or dissuade any member from making a complaint or from requesting a referral of a complaint;
- ◆ prevent or dissuade or attempt to prevent or dissuade a member from investigating a complaint, referring a complaint or taking any other action in relation to this part;
- ◆ cause a member to be victimized, penalized or in any way prejudiced for making a complaint or requesting the referral of a complaint.

This regulatory offence carries a penalty of \$500 or imprisonment for three months.

Where acts of reprisal are found to have occurred within the civilian contingent of the DND, a report should be made to the responsible party's department head with a copy to the supervisor, recommending appropriate disciplinary and administrative sanctions. Where the responsible party is a member of the Canadian Forces, the Ombudsman will report such acts to the Provost Marshal, along with a recommendation as to whether a charge should be laid under the *National Defence Act*. Because of the seriousness of such allegations and the overwhelming need to eliminate retaliation and reprisal, written reasons should be provided to the Ombudsman by a department head and supervisor or the Provost Marshal, in each case where no action is pursued (in the case of a civilian member) or no charges are laid (in the case of a member of the Canadian Forces).³⁶⁶

³⁶⁶ This mechanism of ensuring accountability for declining to take action on recommendations is similar to provisions contained in recent amendments to the *National Defence Act* establishing the Canadian Forces Grievance Board and providing that the Chief of Defence Staff, although not bound by the Board's recommendations, will be required to provide reasons where he does not act on findings or recommendations of the Board. (See Amendments to the *National Defence Act*, Issue Paper No 9: *Reform of the Canadian Forces Grievance Process*, at page 3). See also new amendments to the *National Defence Act*, s. 250.51 through to s. 250.52 which require reasons to be given where no action is taken in respect of a report on a complaint by the Military Police Complaints Commission.

I therefore recommend that:

The Ombudsman's Office should be empowered to investigate in any circumstances where there is an alleged act of retribution or reprisal against anyone who makes a complaint or against anyone who assists in making a complaint to the Ombudsman's Office or against anyone who cooperates with the Ombudsman's Office in the investigation or resolution of any complaint.

Where, in the opinion of the Ombudsman, there are reasonable grounds to believe that a civilian member of DND is responsible for acts of reprisal or retribution, a report should be made to the person's department head and/or their supervisor, recommending appropriate disciplinary and administrative sanctions.

The regulations of the *National Defence Act* should be amended to make it a specific offence for any member of the Canadian Forces to engage in an act of retribution or reprisal against anyone who makes a complaint or anyone who assists in making a complaint to the Ombudsman's Office or against anyone who cooperates with the Ombudsman's Office in the investigation or resolution of any complaint.

Where, in the opinion of the Ombudsman there are reasonable grounds to believe that a member of the Canadian Forces is responsible for acts of reprisal or retribution, a report should be made where appropriate, to the Provost Marshal recommending the laying of a charge under the *National Defence Act*.

In circumstances where a department head or supervisor (in the case of civilian DND members) or the Provost Marshal (in the case of Canadian Forces Members), declines to take the action recommended by the Ombudsman in response to a finding of an act of retribution or reprisal, they should provide written reasons for their decision, to the Ombudsman.

MALICIOUS OR VEXATIOUS COMPLAINTS

This Office has a related duty to protect members from malicious or vexatious complaints. There is considerable apprehension in many quarters that an unfounded allegation will have severe consequences on an individual's career until the matter is resolved, and even beyond. Certainly, individuals unjustly accused of wrongdoing are just as entitled to fair treatment as any other member of the DND/CF.

There is, however, a delicate balance between the rights of all the parties concerned. We do not want to discourage members from coming forward. Additionally, it is often very difficult to prove that a complaint has been laid maliciously. Each instance needs to be investigated very thoroughly.

If an investigation of the complaint reveals that the complaint is fabricated or malicious, the Ombudsman may unilaterally abrogate confidentiality and investigate, or refer the matter for investigation to another body, where appropriate. It should be a serious offence to willfully make a false statement to, or mislead, the Ombudsman or his or her staff in the making of a complaint or during the course of an investigation or resolution of any matter.

I therefore recommend that:

Any person who willfully makes any false statements to or misleads or attempts to mislead the Ombudsman or any other person in the exercise or performance of his or her functions and duties shall be subject to severe sanction.

The investigation and reporting procedures in such cases should be identical to those outlined above under the heading “Protection from Reprisal”.

OBSTRUCTION

It should be clearly stated that any obstruction or hindrance of the Ombudsman or his or her staff in the execution of their duties will not be tolerated. Any such conduct should be the subject of severe sanction.

I therefore recommend that:

Any person who without lawful justification or excuse willfully obstructs, hinders or resists the Ombudsman or any other person in the exercise or performance of his or her functions or duties, shall be subject to severe sanction.

The investigation and reporting procedures in such cases should be identical to those outlined above under the heading “Protection from Reprisal”.

REPORTING

INFORMAL BAROMETER

An important function of any Ombudsman is to identify potential or nascent problems within the organization, and bring them to the attention of those empowered to deal with them as soon as possible. Given my broad constituency and the number of complaints my Office is expected to receive, I anticipate that we will become aware of emerging trends and situations that, if ignored, may develop into systemic or individual injustices.³⁶⁷ This may be the case whether or not I determine to invoke my mandate in any particular instance. I will advise you in these cases, while, at the same time, protecting the confidentiality of the complainant. This informal "barometering" will provide the DND/CF with a unique opportunity to deal with issues before they develop into larger, more widespread problems, which are more difficult and costly to remedy.

ANNUAL REPORT

You have already established that the Ombudsman shall submit an Annual Report to you and that you will table this Report in Parliament.³⁶⁸ The Report will include a statistical breakdown, trends, systemic and individual issues and case studies, and any

³⁶⁷ We are currently assessing case management software that will allow us to identify potentially systemic issues as quickly as possible.

³⁶⁸ The Honourable Art Eggleton, P.C., M.P., Minister of National Defence - Transcript - *Introducing the DND/CF Ombudsman*, June 9, 1998: "Remember, he'll be able to report to me and reports made public so that if there are any systemic problems, if there are any difficulties he finds in being able to make sure that justice is done then it'll become public information and a Minister has to be accountable for that. I will be accountable for that, any successor of mine has to be accountable for that."

recommendations flowing from them. To preserve confidentiality, we will remove all identifiers prior to submission of the report.

SPECIAL REPORTS

During the course of the consultation it was constantly brought to our attention that to be seen as a credible and accountable agency we should provide information and feedback on the operations and activities of our Office on a regular basis. The consensus was that the Ombudsman should also have the authority and the discretion to issue special reports and to take the necessary steps to ensure regular feedback in order to inform members of the DND/CF and the general public of the issues being dealt with:

- We need to be kept informed. (*Meeting with 423 Squadron, 12 Wing Shearwater, October 27, 1998*)
- Need keep us informed, not just Annual Report. (*Luncheon – NATO, Brussels, November 4, 1998*)
- You said the ultimate tool was going public. Will this be through annual reports, because it seems too late sometimes? You need more periodic reporting in order to have more impact and quicker response. My suggestion is if beaten all cages and nothing happens; you should go public at that time on each and every issue. (*General Comments, Velika Kladusa, Bosnia, November 11, 1998*)
- Need more than Annual Report, look at all the issues. (*Meeting at the Mess, Drvar, Bosnia*)
- It now seems that your Ombudsman can only make an annual report to the Minister. The Ombudsman needs to do Special Reports. (*Meeting with Lt.-Kol. Schoof, Defence Attaché, Embassy of the Federal Republic of Germany, Ottawa, December 7, 1998*)
- Need to be informed on what the Ombudsman does. (*Meeting with Supply Section, 4 Wing Cold Lake, September 15, 1998*)
- Produce reports of some sort regularly, so that we know what your office is doing. (*Meeting with the 423 (MH) Squadron, 12 Wing Shearwater, October 27, 1998*)

Special reports, issued at my discretion, will meet the need of members of the DND/CF and of the general public to be kept informed in a timely fashion of the progress of the Ombudsman's Office, and the positive changes it will bring to the organization.

The practice of issuing special reports on an "as needed" basis is relatively common. For example, the Auditor General of Canada, who, in addition to his mandatory Annual

Report to the House of Commons, may also publish up to three additional Reports.³⁶⁹ The Auditor General also has the additional power to make “*special reports*” to the House of Commons on “*any matter of pressing importance or urgency*”, that in his opinion should not be deferred until the presentation of his next scheduled report.³⁷⁰

The Committee on the Concept of a Federal Ombudsman studied the idea of issuing special reports and concluded that:

There are two dimensions to such reports: they are timely; and they focus the attention of Parliament on the particular issues involved, whether they arise from important cases or from matters affecting the operation of the office of the Ombudsman. The authority to issue special reports is an important instrument, without which the effectiveness of an Ombudsman would be very much impaired.³⁷¹

The Committee recommended that:

The Ombudsman should be empowered to submit a special report to Parliament on any matter within his jurisdiction, at any time he thinks fit, provided that, if the matter concerns an investigation, he has followed the obligatory reporting sequence recommended earlier.³⁷²

Any reports issued by my Office should be public documents to ensure openness, transparency and accountability:

- You should make your recommendations public and make the office accountable and transparent. (*Meeting with Junior NCMs, CFB Gagetown, October 29, 1998*)
- The right to comment publicly is a very important tool – used scarcely but very useful. It is also a good tool as a matter of transparency and accountability. (*Meeting with Me Daniel Jacoby, Q.C., Protecteur du Citoyen du Québec, August 19, 1998*)
- Need to build trust and understanding, establish open channels of communications and put everything on the table – can’t have hidden agenda or will lose credibility. (*Meeting with Me Yves Côté, Q.C., DND/CF Legal Advisor, November 3, 1998*)
- You need the power to go public. It’s a question of credibility. (*Meeting with Me Simon Noël, Q.C., Hull, September 22, 1998*)

³⁶⁹ See: *Auditor General Act*, *supra*, note 148, s. 7(1)(2) which provides for three reports (in addition to the Auditor General’s Annual Report) on the work of his office and on whether in carrying on the work of his office, he has received all the information and explanations he required. Such Reports must contain anything he considers to be of significance and of a nature that should be brought to attention of the House of Commons including specific cases which fall within s. 7(2)(a)(f), dealing with misappropriation of government funds.

³⁷⁰ *Ibid.*, s. 8.

³⁷¹ *Report of the Committee on the Concept of the Ombudsman*, *supra*, note 43 at page 56.

³⁷² *Ibid.*

- To have more credibility you must report publicly. (*Meeting with Junior Officers and Civilian Personnel, CFB Halifax, October 26, 1998*)
- Power of public comment is very important. It's more effective to have independent Ombudsman than someone in uniform trying to convey a message regarding the CF. (Area Briefing, LFAA, Halifax, October 28, 1998)
- Recommendations must be made public, so there is openness and transparency in the process. Strongest tool is the power of public reporting. (*Meeting with Lt.-Kol. Schoof, Defence Attaché, Embassy of the Federal Republic of Germany, Ottawa, December 7, 1998*)

As I remarked upon my appointment, the tool of public comment will be an important one for my Office:

If there's any flaws, systemic or personal or otherwise that I'm not able to get moving or resolved at that low level, I'll go walk down the hall, knock on the Minister's desk and here goes the report and it goes out to the press and so I think that's extremely powerful tool to make sure that things are addressed properly, so I have faith in that, that putting the spot, like the public spotlight on issues should matters not be resolved will make sure that the entire system works and the Ombudsman's office is effective.³⁷³

[...] I will be in a position to effect change where the problem happens and I will be able, with the authority and influence of that office, bring it to the attention of the Minister and as well make them public should they not be resolved and so, you know, I think that this is a tremendous tool in the arsenal of the rank and file to get things moving and resolved.³⁷⁴

I therefore recommend that:

The Ombudsman should report annually to the Minister, and may also, at his discretion, report at other times as he deems fit. All such reports should be public documents.

³⁷³ Me André Marin, Ombudsman - Transcript - *Introducing the DND/CF Ombudsman*, June 9, 1998.

³⁷⁴ *Ibid.*

REVIEW OF IMPLEMENTATION OF RECOMMENDATIONS

It is an increasingly common and effective practice, at least in the Province of Ontario,³⁷⁵ for Coroners juries to publicly review the implementation of recommendations made by them, usually one year after making those recommendations.³⁷⁶ I believe this practice would be useful in cases where I have made recommendations. Not only will this increase the openness, transparency and accountability of the DND/CF, but it will shine a public spotlight on areas where positive change has been effected by the DND/CF.

I therefore recommend that:

The Ombudsman may review the implementation of any recommendations made by him or her and may report publicly to the Minister on the progress made in implementing those recommendations.

³⁷⁵ In a telephone interview with a member of my staff, Dr. Jim Cairns, the Deputy Chief Coroner of the Province of Ontario stated that, since the practice was introduced by the jury at the *Christopher Stephenson Inquest* in 1992, “from our perspective, the attention the recommendations receive, and the quality of response, is like night and day.”

³⁷⁶ Review mechanisms also exist in legislation governing several of the Provincial Ombudsmen.

CONCLUSION

CONCLUSION

The concept of an Ombudsman is not new in either the civilian or military contexts, as can be seen above. However, no two models are identical. An Ombudsman's model will only be successful in its implementation if it is tailored to meet the demand which led to its creation.

The recommendations made in the *Action Plan* reflect a model which will ensure that while the authority of the chain of command and other avenues of redress are respected, the Ombudsman is empowered to be effective and to develop the credibility he or she needs to operate. The model also provides the authority to the Minister of National Defence to direct the Ombudsman to conduct investigations in areas not necessarily covered by the Office's mandate. In addition, the Minister has the authority to issue general policy directives to the Ombudsman in relation to the operations of his office, as long as they are made public and tabled in Parliament. This authority does not impede on the day-to-day administration of the office, which is the sole responsibility of the Ombudsman, and which includes the formalities of invoking the mandate, prioritizing cases, determining whether and how investigations will be done, hiring of staff, how the budget shall be allocated and when to issue public reports. In my view, this strikes a fair balance between the high degree of independence required for the Ombudsman to run a credible office while recognizing appropriate ministerial supervision along with corresponding accountability to Parliament. I make no pretension that the proposal is perfect, and I undertake to revisit the operational requirements of the office in my Annual Report or special reports, if need be.

I thank all members of the DND/CF for their contributions and support during this formative stage of the Office, as well as the many others who have assisted us by sharing their views on the future operations of the Office.

The consultation, research and writing of this report in the few months I have had would not have been made possible without the help of the energetic and devoted team of professionals in my Office who have supported me throughout. Senior Policy Advisor Gareth Jones, Policy Advisors Barb Finlay, Mimi Lepage and Marc Pilon devoted considerable hours, far beyond the call of duty, to ensure the delivery of a work product of the highest quality. I am also indebted, as usual, to Communications Director Barbara Theobalds and to the Administrative and Support Staff who all put in a team effort and showed their ability to work with very little supervision.

Finally, I wish to thank you for the assistance you have given me since my appointment in June 1998. I am grateful for your consistent support and your desire for the Office of the Ombudsman to succeed in effecting positive change within the institution of the DND/CF.

APPENDICES

APPENDIX I – RECOMMENDATIONS

1. The Ombudsman should have complete operational control and discretion in the exercise of the Office's functions, duties, policies, procedures, expenses and responsibilities.
2. When the Minister of National Defence issues a general policy directive to the Ombudsman, it shall be made public and tabled in Parliament.
3. The DND/CF Ombudsman should be funded directly from Treasury Board.
4. In the alternative, the budget for the Ombudsman's Office should appear as a separate line from other departmental expenditures. Further, the Minister of National Defence should approve the Ombudsman's budget based on an individual assessment of the needs of the Office conducted by an agency outside of the DND to be appointed by the Ombudsman.
5. To ensure transparency, openness and accountability, the Ombudsman's budget shall be reported publicly in the Annual Report.
6. The Ombudsman's Office should be resourced to fulfil its functions. The Ombudsman's Office should be able to spend and account for its funds directly.
7. The Ombudsman should have the sole authority to appoint employees to his Office, outside of federal public service restrictions.
8. The Ombudsman should have the sole authority to set the terms and conditions of employment for all of the employees in his Office. Employees of the Ombudsman's Office should be answerable solely to the Ombudsman.
9. The Ombudsman should be provided with the specific authority to appoint employees to his Office, pursuant to an amendment to the regulations of the *National Defence Act*. In the alternative, that the Public Service Commission should be petitioned and the approval of the Governor in Council be sought, for an exemption under section 41 of the *Public Service Employment Act* for all positions established by and all appointments made by the Ombudsman. The exemption should be from all provisions of the *Act*, which would interfere with the Ombudsman's unfettered ability to select employees for his or her Office.
10. The Ombudsman should have complete authority to determine the composition of his staff, including any current or former DND/CF representation on staff and the employment of military and civilian personnel as advisors.

11. The Ombudsman should, within one year of beginning his operations, establish a DND/CF advisory committee. The advisory committee will meet on a regular basis to provide the Ombudsman with advice on how to deal with issues within the context of the DND/CF. The representation of this committee should be determined by the Ombudsman, having regard to the need to ensure broad based representation within the constituency.
12. The Ombudsman should be free to contract for the professional services of persons having technical or specialized knowledge of any matters, required to advise and assist him or her in carrying out his or her duties. Such persons will be remunerated as contracted by the Ombudsman, subject to the budgetary constraints of his or her Office, with provision to seek approval for special funding for such contracts, directly from the Minister.
13. The Ombudsman should be free to appoint an Independent Legal Advisor, to provide legal advice to the Ombudsman on all matters of law pertaining to the Office.
14. The Ombudsman's Legal Advisor should be from outside of the DND/CF and the federal public service and independent of the combined legal services organization, composed of the office of JAG and the DOJ/DLSU.
15. The Ombudsman should have access to the legal staff of the JAG and DOJ/DLSU to provide information and expertise on specific matters.
16. The Ombudsman should have the sole authority to delegate to a member of the Ombudsman's Office any of the Ombudsman's powers, duties or functions, except the power to delegate and the duty to submit an Annual Report.
17. The Ombudsman's decisions, recommendations and reports should be final and not subject to being challenged, reviewed, quashed or called into question by any authority or in any Court.
18. The *National Defence Act* should be amended to specifically provide that the Ombudsman and persons acting under his direction are immune from criminal or civil proceedings for anything done, reported or said in good faith while carrying out their duties and that for the purposes of any law relating to libel or slander, anything said or any information supplied or any document produced in good faith in the course of an investigation by the Ombudsman or his staff or any report made in good faith by the Ombudsman and any fair and accurate account of the report, made in good faith in a newspaper or any other publication or in a broadcast, is privileged.

19. In the alternative, a regulation should be passed pursuant to the *National Defence Act* to specifically provide that the Ombudsman and persons acting under his direction are immune from criminal or civil proceedings for anything done, reported or said in good faith while carrying out their duties and that for the purposes of any law relating to libel or slander, anything said or any information supplied or any document produced in good faith in the course of an investigation by the Ombudsman or his staff or any report made in good faith by the Ombudsman and any fair and accurate account of the report, made in good faith in a newspaper or any other publication or in a broadcast, is privileged.
20. DND should fund outside counsel to represent any member of the Ombudsman's Office, named in a civil proceeding. In the absence of immunity, the DND will also be financially responsible for indemnifying all members of the Ombudsman's Office for civil liabilities incurred while acting in good faith, in the carrying out of their duties.
21. The Ombudsman and members of his staff should swear an oath of secrecy and confidentiality.
22. Correspondence from any person who resides on any CF base, wing or formation, who is deployed by the CF or who is in detention, incarceration or hospitalized must be forwarded immediately to the Ombudsman, unopened and unread. The same treatment must be accorded any correspondence flowing from the Ombudsman's Office to such persons. All communications, including e-mail, telephone and cellular phone communications, between such persons and the Ombudsman or any member of his staff must be treated as confidential and not subject to interception.
23. Communications between the Ombudsman and any person should not be covered or counted under any restrictions on that person's right to send letters or other documents or to receive or make telephone calls.
24. Severe sanctions should follow against anyone who opens correspondence or takes any other action to intrude on the confidentiality of communications between another person and the Ombudsman.
25. Strict procedures should be put in place in the Ombudsman's Office to ensure confidential handling of all complaints including all documentation provided to the Ombudsman's Office in the course of dealing with a complaint.
26. Mechanisms should also be created to ensure that all records of internal and external communications to or by the Ombudsman or his staff are not accessible to anyone outside of the Office including the DND. This should include all records of internal and external phone calls, e-mails and cellular phone communications.

27. In addition to having access to the DND/CF computer systems, the Ombudsman's Office should have a separate computer system by which complainants can access the Office. This system should not be subject to monitoring and its files must not be accessible by any outside source including the DND/CF.
28. All investigations conducted by the Ombudsman's Office should be conducted in private.
29. The Ombudsman and members of his staff should be bound not to disclose any matter coming to the Ombudsman's attention except in so far as is necessary for the purpose of an investigation or to substantiate findings or recommendations of the Ombudsman in a particular case.
30. The Ombudsman should be free to establish clear policies for the confidential storage and retention of case files and all records in possession of the Office, including telephone records. The Ombudsman should also be free to establish clear guidelines for the destruction of closed files, after specific periods of time have elapsed.
31. Until such time as the Ombudsman's Office obtains an exemption from the *Access to Information and Privacy Acts*, the Ombudsman may establish a Coordinator for *Access to Information and Privacy Act* requests separate from the DND/CF Access to Information Coordinator.
32. The necessary legislative steps required to bring my Office within the exemption accorded by section 24 of the *Access to Information Act* should be taken. In the alternative, the necessary legislative or regulatory steps should be taken to bring my Office within the exemption provided by section 16(1)(c) of the *Act*.
33. All necessary legislative or regulatory steps be taken to bring my Office within available exemptions to the disclosure of information under the *Privacy Act*.
34. The *National Defence Act* should be amended to declare that the Ombudsman and any member of his staff are exempt from being compelled to testify or to produce documents in any judicial or quasi-judicial or administrative proceeding, except where required for the prosecution of anyone for interfering with an Ombudsman's investigation, for providing false or misleading information to the Ombudsman or for enacting a reprisal on anyone who makes a complaint to the Ombudsman or for perjury.

35. In the alternative, a regulation should be passed pursuant to the *National Defence Act* to declare that the Ombudsman and any member of his staff are exempt from being compelled to testify or to produce documents in any judicial or quasi-judicial or administrative proceeding, except where required for the prosecution of anyone for interfering with an Ombudsman's investigation, for providing false or misleading information to the Ombudsman or for enacting a reprisal on anyone who makes a complaint to the Ombudsman or for perjury.
36. All Regular Force members, Reserve Force members, former service members, civilian employees, their parents, spouse or next of kin may bring a complaint or issue to the direct attention of the Ombudsman's Office, without charge.
37. The Ombudsman has jurisdiction to issue recommendations concerning individual and systemic issues and injustices.
38. The Minister of National Defence should consider consulting the Minister of Veterans Affairs and issue a directive to the Ombudsman with respect to the Ombudsman's jurisdiction over matters that fall within the mandate of the Department of Veterans Affairs.
39. The Minister of National Defence should issue a directive to the Ombudsman in respect of the Ombudsman's jurisdiction over NPF employees, cadets, DND/CF contractors or any other group or agency.
40. The Ombudsman's Office should be resourced to set-up three regional offices in addition to the office in Ottawa, one in Western Canada, one in Atlantic Canada, and an office in Europe, to act as a front line resource for issues and complaints originating from those areas. These offices will not be located on DND property. The Ombudsman will review the requirement for regional offices on a regular basis, and make further recommendations as he or she sees fit.
41. The Ombudsman should be a direct source of information, referral and education to assist individuals to access existing channels of assistance and redress within the DND/CF.
42. The Ombudsman will determine whether the complainant has sufficient personal interest in any matter complained about to the Ombudsman, or if not, whether other special circumstances exist, to warrant invoking the mandate.
43. The Ombudsman, at his or her discretion, will not, absent special circumstances, formally invoke his or her mandate if an adequate remedy or right of appeal already exists whether or not the complainant has availed himself or herself of the remedy or right of appeal.

44. The Ombudsman will consider whether it is in the public interest to invoke his or her mandate in respect of any complaint made to him or her.
45. The Ombudsman will not investigate any complaint that is deemed by him or her to be frivolous, vexatious or trivial.
46. The Ombudsman shall investigate any matter when requested to do so by the Minister of National Defence.
47. The Ombudsman may invoke his or her mandate in any circumstances where he or she deems it appropriate.
48. The Ombudsman may investigate any matter in any manner he or she deems fit.
49. All members of the DND/CF shall co-operate fully with the Ombudsman, who may compel any person to give any information relating to the matter being investigated by the Ombudsman, and to furnish him or her forthwith with any such information, in any form requested, including under oath, if the Ombudsman so determines; and to produce forthwith any documents, objects or things which in the Ombudsman's opinion relate to any such matter and which may be in the possession or under the control of that person.
50. Any member who fails to cooperate fully with the Ombudsman's Office, or who fails to abide by the provisions of any regulation created in respect of the Office, shall be subject to severe sanction.
51. The Ombudsman's Office will respect the principles of natural justice and procedural fairness.
52. Absent special circumstances, the Ombudsman will notify all involved parties of his or her intention to investigate any matter that falls within his or her mandate, and give them the opportunity to respond.
53. Subject to full co-operation from all parties, the Ombudsman shall aim to complete investigations within 60 days of invoking his or her mandate.
54. The Ombudsman's Office has immediate and direct access to all personnel records held by the DND/CF.
55. Absent special circumstances, the Ombudsman will keep all involved parties informed of the progress and disposition of a case.
56. No member of the DND/CF shall make any public comment on any matter upon which the Ombudsman has invoked his or her mandate, without the Ombudsman's written consent, until the conclusion of the investigation.

57. The Ombudsman's Office should be empowered to investigate in any circumstances where there is an alleged act of retribution or reprisal against anyone who makes a complaint or against anyone who assists in making a complaint to the Ombudsman's Office or against anyone who cooperates with the Ombudsman's Office in the investigation or resolution of any complaint.
58. Where, in the opinion of the Ombudsman, there are reasonable grounds to believe that a civilian member of the DND is responsible for acts of reprisal or retribution, a report should be made to the person's department head and/or their supervisor, recommending appropriate disciplinary and administrative sanctions.
59. The regulations of the *National Defence Act* should be amended to make it a specific offence for any member of the CF to engage in an act of retribution or reprisal against anyone who makes a complaint or anyone who assists in making a complaint to the Ombudsman's Office or against anyone who cooperates with the Ombudsman's Office in the investigation or resolution of any complaint.
60. Where, in the opinion of the Ombudsman, there are reasonable grounds to believe that a member of the CF is responsible for acts of reprisal or retribution, a report should be made where appropriate, to the Provost Marshal recommending the laying of a charge under the *National Defence Act*.
61. In circumstances where a department head or supervisor (in the case of civilian DND members) or the Provost Marshal (in the case of Canadian Forces Members), declines to take the action recommended by the Ombudsman in response to a finding of an act of retribution or reprisal, they should provide written reasons for their decision, to the Ombudsman.
62. Any person who willfully makes any false statements to or misleads or attempts to mislead the Ombudsman or any other person in the exercise or performance of his or her functions and duties shall be subject to severe sanction.
63. The investigation and reporting procedures in such cases should be identical to those outlined above under the heading "Protection from Reprisal".
64. Any person who without lawful justification or excuse willfully obstructs, hinders or resists the Ombudsman or any other person in the exercise or performance of his or her functions or duties, shall be subject to severe sanction.
65. The investigation and reporting procedures in such cases should be identical to those outlined above under the heading "Protection from Reprisal".

66. The Ombudsman should report annually to Minister of National Defence, and may also, at his discretion, report at other times as he deems fit. All such reports should be public documents.

67. The Ombudsman may review the implementation of any recommendations made by him or her and may report publicly to the Minister on the progress made in implementing those recommendations.

APPENDIX II – CONSULTATIONS AND BRIEFINGS

PART 1: CANADIAN FORCES BASES, STATIONS, WINGS, UNITS, SCHOOLS AND FORMATIONS

Province of Alberta

1 Air Maintenance Squadron
 1 Area Support Group
 1 Canadian Mechanized Brigade Group
 1 Field Ambulance
 1 Military Police Platoon
 1 Princess Patricia's Canadian Light Infantry
 38 Canadian Brigade Group
 4 Air Defence Regiment
 4 Airfield Engineer Squadron
 4 Wing Headquarters
 441 Tactical Fighter Squadron
 Canadian Forces Base Edmonton
 Edmonton Garrison
 Land Forces Western Area Headquarters
 Land Forces Western Area Training Center Wainwright
 Lord Strathcona's Horse (Royal Canadians)
 Military Family Resource Centre (Edmonton)
 Replenishment Coy, Greisbach

Province of British Columbia

Canadian Fleet Pacific
 Canadian Forces Base Esquimalt
 Her Majesty's Canadian Ship ALGONQUIN
 Maritime Forces Pacific Headquarters
 Military Family Resource Centre Workpoint

Province of Manitoba

1 Canadian Air Division
 17 Wing Headquarters
 2nd Battalion Princess Patricia's Canadian Light Infantry
 3 Canadian Forces Flight Training School
 38 Canadian Brigade Group
 402 Squadron
 Canadian Forces Base Shilo
 Canadian Forces Base Winnipeg
 Canadian Forces Recruit Centre Winnipeg staff
 Canadian Forces School of Meteorology
 Minto Armouries

Province of New Brunswick

2nd Battalion Royal Canadian Regiment
4 Engineering Support Regiments
Canadian Forces Base Gagetown
Family Resource Centre (Gagetown)

Province of Newfoundland

9 Wing Headquarters
Canadian Forces Base Gander

Province of Nova Scotia

12 Air Maintenance Squadron
12 Wing Headquarters
12 Wing Shearwater union local
36 Canadian Brigade Group
406 Maritime Operational Training Squadron
423 Maritime Helicopter squadron
Canadian Forces Ammunition Depot Bedford union local
Canadian Forces Base Halifax
Fleet Diving Unit
Fleet Maintenance Facility Cape Scott
Helicopter Testing and Evaluation Facility
Her Majesty's Canadian Ship TORONTO
Her Majesty's Canadian Submarine OJIBWA
Land Forces Atlantic Area Headquarters
Maritime Forces Atlantic Headquarters
Maritime Operations Group Five
Military Family Resource Centre (Halifax)

Province of Ontario

1 Canadian Division & Signals Headquarters
1 Royal Canadian Regiment 2 Service Battalion
16 Wing Borden
2 Canadian Mechanized Brigade Group
8 Wing Trenton
Army Lessons Learned Centre
Canadian Forces Base Borden
Canadian Forces Base Petawawa
Canadian Forces Command and Staff College
Canadian Forces Information Operations Group Headquarters
Canadian Forces Medical Services School
Canadian Forces Recruiting, Education and Training Systems Headquarters
Canadian Forces Station Leitrim
Canadian Land Forces Command and Staff College

Conflict Resolution Centre
 Directorate Land Strategic Concepts
 Directorate of Army Doctrine
 Headquarters and Signals Squadron
 Peacekeeping Support Training Centre
 Royal Military College

Province of Québec

1^{er} Bataillon du Royal 22^e Régiment
2^e Bataillon du Royal 22^e Régiment
2^e Régiment blindé du Canada
3^e Bataillon du Royal 22^e Régiment
3^e Escadre Bagotville
430^e Escadron tactique d'hélicoptères
5^e Ambulance de campagne
5^e Bataillon de services du Canada
5^e Groupe-Brigade Mécanisé du Canada
5^e Peloton de police militaire
5^e Régiment d'artillerie légère du Canada
5^e Régiment du génie de combat
Base des Forces canadiennes Bagotville
Centre de recrutement des Forces canadiennes
École de langues des Forces canadiennes
École de leadership et recrues des Forces canadiennes
École de perfectionnement et de gestion des Forces canadiennes
École navale Forces canadiennes Québec
Navire Canadien de sa Majesté CHAMPLAIN
NCSM MONTCALM
Quartier général Cadets
Quartier Général de la Réserve navale
Quartier général du secteur du Québec de la Force Terrestre
Régiment du Saguenay
Unité de soutien de secteur Saint-Jean

Province of Saskatchewan

15 Air Maintenance Squadron
 15 Wing Moose Jaw

Outside Canada

Canadian Contingent LOGBATT – Golan Heights, Israel
 Canadian Contingent United Nations Disengagement Observer Force – Golan Heights, Israel
 Canadian Contingent NATO Airborne Early Warning Force (NAEWF) – Belgium
 Canadian Contingent Stabilization Force (CCSFOR) – Bosnia
 Canadian Defence Attachés (Rome and Tel Aviv)

Canadian Defence Liaison Staff (Washington, D.C.)
Canadian Forces Support Unit (Europe) – Geilenkirchen, Germany
Canadian Forces Support Unit (Europe) – Selfkant, Germany
NATO International Military Staff – Belgium (Canadian staff)
Supreme Headquarters Allied Powers Europe (SHAPE) – Belgium (Canadian staff)

PART 2: NATIONAL DEFENCE HEADQUARTERS STAFF

Deputy Minister
Chief of the Defence Staff
Vice Chief of the Defence Staff
Assistant Deputy Minister (Finance and Corporate Services)
Assistant Deputy Minister (Human Resources-Civilian)
Assistant Deputy Minister (Human Resources-Military)
 Chief of Staff
 Director Personnel Complaints Resolution
 Executive Director Conflict Management
Assistant Deputy Minister (Materiel)
Assistant Deputy Minister (Policy)
Deputy Chief of Defence Staff
Chief of Review Services
 Senior Principal
Judge Advocate General
Chief of the Air Staff
 Associate Chief of the Air Staff
Chief of the Land Staff
 Associate Chief of the Land Staff
Chief of the Maritime Staff
 Director General Maritime Doctrines and Operations
 Director General Naval Personnel
Canadian Forces Provost Marshal
Defence Chief Information Officer
Chaplain General
Military Police Company
 Military Police Sergeant-Major
 Assistant Provost Marshal (National Capital Region)
DND/CF Legal Advisor
Canadian Forces Gender Integration and Employment Equity Advisor
Quality of Life Team

**PART 3: REPRESENTATIVES OF ARMED FORCES INSPECTORS-GENERAL,
FEDERAL, PROVINCIAL AND PRIVATE INDUSTRY OMBUDSMAN OFFICES**

Armed Forces Inspectors-General/Ombudsmen

Australian Defence Force Ombudsman
Czech Republic Armed Forces Ombudsman
Danish Ombudsman
Israeli Defence Force Soldiers' Complaint Commissioner
Norwegian Armed Forces Ombudsman
Parliamentary Commissioner German Armed Forces
Royal Netherlands Armed Forces Inspector-General
Swedish Ombudsman
United States Department of Defense Inspector General
United States Inspector General (Army) Europe

Federal and Provincial Government Ombudsmen

Alberta Provincial Ombudsman
Atlantic Regional Director Canadian Human Rights Commission
British Columbia Provincial Ombudsman
British Columbia Worker's Compensation Board
Canada Post Ombudsman
Canadian International Development Agency Ombudsman
Correctional Investigator Canada
Department of Foreign Affairs and International Trade Ombudsman
Department of Indian Affairs and Northern Development Ombudsman
Industry Canada, Bureau of Competition Policy, Compliance and Coordination Directorate
Manitoba Provincial Ombudsman
Nova Scotia Provincial Ombudsman
Office of the Commissioner of Official Languages
Office of the Information Commissioner of Canada
Office of the Privacy Commissioner of Canada
Ontario Provincial Ombudsman
Protecteur du citoyen du Québec
RCMP External Review Committee

Private Industry Ombudsmen

Algonquin College Ombudsman
American Express (US) Ombudsman
Bank of Nova Scotia Ombudsman
Canadian Banking Ombudsman
Canadian Broadcasting Corporation Ombudsmen (English and French)
Concordia University Ombudsman
Columbia University Ombudsman
FBI Ombudsman
Harvard Medical School Ombudsman

Hydro-Québec Ombudsman
Ombudsman Service International, Consulting Ombudsman
San Francisco Police Department
Sandia National Laboratories (US) Ombudsman
Shell Oil Company (US) Ombudsman
Toronto-Dominion Bank Ombudsman and 'Between Us' program
Toronto Star Ombud

**PART 4: REPRESENTATIVES OF OTHER GOVERNMENT
DEPARTMENTS, UNIONS AND AGENCIES**

Canadian Merchant Service Guild
Federal Government Dockyard Chargehands Association
Federal Government Trades and Labour Council (East)
International Brotherhood of Electrical Workers
Parliamentary Defence Critics
Professional Institute of the Public Service
Public Service Commission
Queens Harbour Master Union Local
Royal Canadian Legion
Union of National Defence Employees
United States Minister Counsellor for Political Affairs

PART 5: INDIVIDUALS

Colonel (Retired) Michel Drapeau
Doctor Barry Armstrong
Doctor Douglas Bland
Doctor Mary Rowe
Doctor Patrick Robardet
Honourable George W. Adams, Q.C.
Honourable J. Gilles Lamontagne
Honourable Justice Gilles Létourneau
Maître Daniel Mockle
Maître Simon Noël, C.R.
Mr. Scott Taylor
Professor Ed Ratushny

**PART 6: RETIRED AND CURRENT MEMBERS OF THE DND/CF, THEIR
FAMILIES AND THE GENERAL PUBLIC**

We received numerous comments and suggestions from retired and current members of the Department of National Defence and the Canadian Forces, their families, as well as the general public. Many requested that their identifies be kept confidential, however, their views and opinions were taken into consideration during the writing of the report.

PART 7: CONFERENCES AND SPEECHES

Advanced Logistic Officers Course (Borden)
Base Commanders' Forum (Ottawa)
Chief of the Maritime Staff Working Group (Ottawa)
Conférence du Protecteur du citoyen (Montréal)
Conference on Ethics in the Canadian Forces (Ottawa)
General Officers' Seminar (Ottawa)
Journées de Perfectionnement (Saint-Jean et Valcartier)
The Ombudsman Association – Ombudsman 101 Course (Washington, D.C.)
National Personnel Administration Officer Professional Development Seminar (Ottawa)
Ombudsman Investigators Workshop (Halifax)
Senior Non-Commissioned Members Meeting (Ottawa)
Union Management Consultation Committee (Ottawa)
United States Ombudsman Association Conference (Detroit, Michigan)

DND/CF COMPLAINT RESOLUTION MECHANISMS

	CF GRIEVANCE BOARD (CFGB)	PUBLIC SERVICE COMMISSION (PSC)	PUBLIC SERVICE STAFF RELATIONS BOARD (PSSRB)	MILITARY POLICE COMPLAINTS COMMISSION (MPCC)	OMBUDSMAN	CONFLICT MANAGEMENT SYSTEM PROJECT
FUNCTION	Review prescribed types of grievances referred to it by CDS.	To conduct investigations and audits related to violations of the PSEA related to staffing.	Hears complaints on allegations of violations of the PSSRA and grievances against collective agreement interpretations and specified disciplinary actions.	Conducts formal investigations into (1) complaints about MP conduct and (2) interference by chain of command in investigations.	Listening, provides/receives info, reframe issues, develop options, referral, helping people help themselves, informal 3 rd party intervention, "Looks into problem", mediation, generic approaches, systems change (trend analysis).	To enhance dispute resolution skills for managers at all levels.
AUTHORITY	Bill C-25, GIC appointments	PSEA GIC appts	PSSRA, GIC appts	Bill C-25, GIC appointments	MND Report to PM. Mar 97 GIC appt	MND Report to PM. Mar 97 (originally called ADR).
RESPONSIBLE TO	Gov't of Canada (thru MND)	Gov't of Canada (thru designated Minister)	Gov't of Canada (thru designated Minister)	Gov't of Canada (thru MND)	MND	Will be integrated into new and existing DND/CF mechanisms and Leadership/Mgt.
POWERS	To conduct hearings. To compel evidence and witnesses.	To conduct hearings. To compel evidence and witnesses.	To conduct hearings. To compel evidence and witnesses.	To conduct hearings. To compel evidence and witnesses.	No formal power, relies on reason and persuasion.	None, this is a system design and implementation capability.
OUTPUT	Make findings and recommendations to CDS.	Decisions and, in certain cases, recommendations only.	Makes final and binding decisions.	Make findings and recommendations to MND, CDS, DM.	Reports and Recommendations (Modality TBD).	Enhanced management skill sets.
REPORTS	Annually to MND. MND tables in Parliament.	Annually to designated Minister. Minister tables in Parliament.	Annually to designated Minister. Minister tables in Parliament.	Annually to MND. MND tables in Parliament.	Annually to MND. MND tables in Parliament.	None.
ISSUES	Staffing process. Timing of stand-up.	N/A	N/A	Staffing process leading to GIC appt. Timing of Stand-Up.	- scope of mandate - inter-relationships - investigative authority - degree of independence (housing, funding, staffing) - modality and frequency of reporting - privacy and access considerations - staffing process (remainder of staff) - publicity when office is operational - timing of Stand-up	- Integration with existing mechanisms - ADM(Per) currently lead agency and will provide progress reports as required.

OTHER MECHANISMS & STAKE HOLDERS

Internal – Mgt/leadership (chain of command), DND/CF Grievances (not CFGB/PSSRB), harassment policies, CRS, MND Monitoring Committee, Boards of Inquiry, CFPM/NIS, IAG, Unions
 External – CHRC, Privacy Commissioner, OL Commissioner, Auditor General, Judicial review federal court/CMAC, Parliament, Information Commissioner

COMPARATIVE STUDY OF SELECTED OMBUDSMEN MODELS AND OTHER SIMILAR AGENCIES

	Power to Investigate	Discretion to refuse investigation	Self-initiated Investigation	Privacy of Investigation	Power to compel production of documents	Power to compel witness statements	Right of Entry	Exemption from Access to Information legislation	Offences and Penalty for Obstruction and Non-compliance	Non-Compellability of Immunity of Ombudsman & Staff
Alberta Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Algonquin College Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Defence Force Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
British Colombia Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CBC Ombudsmen	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CIDA Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Concordia University Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Correctional Investigator	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Czech Republic Armed Forces Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
DFAIT Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
DIAND Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Israeli Defence Force Soldiers' Complaint Commissioner	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Manitoba Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
New Brunswick Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Norwegian Armed Forces Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Nova Scotia Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Official Languages Commissioner	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Ontario Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Parliamentary Commissioner German Armed Forces	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<i>Protecteur du citoyen du Québec</i>	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
RCMP External Review Committee	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Royal Netherlands Armed Forces Inspector General	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Saskatchewan Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Swedish Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
TD Bank - "Between Us" Program	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
TD Bank - Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
US Department of Defense Inspector General	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Legend:

✓ = yes

✗ = no

n/a = not applicable or unknown

COMPARATIVE STUDY OF SELECTED JURISDICTIONS

Alberta Ombudsman	<i>Ombudsman Act, R.S.A. 1980, c.O-7.</i> Jurisdiction: Dept and Agencies of the prov. Gov't; Restrictions: Exec council actions, Boards of Universities, public colleges, institutes, general hospitals, privileged information, secret documents, actions of the Crown Counsel and Crown solicitors.
Algonquin College Ombudsman	<i>Algonquin College Directive No. E20.</i> Mandate is to "investigate, at the request of any student, any complaint regarding various aspects of student life and to serve as an information service by providing advice on policy and procedure, rights and responsibilities, and general guidance on where and to whom complaints and inquiries are appropriately directed."
Australian Defence Force Ombudsman	Commonwealth and Defence Force Ombudsman, <i>Ombudsman Act 1976 (Commonwealth)</i> . Jurisdiction: may investigate complaints made by mbrs of the Defence Forces. Restrictions: Actions taken by the Minister, Justice or Judge of a court, officer of a court, proceedings in Parliament, disciplinary action.
British Columbia Ombudsman	<i>Ombudsman Act, R.S.B.C. 1996, c.340.</i> Wide jurisdiction; Restrictions: no authority to investigate decision, recommendation, act or omission in respect of which there is a right of appeal or a right for a review or a decision, recommendation, act or omission of a person acting as a solicitor for an authority (s.11).
CBC Ombudsmen	Both CBC Ombudsmen (Corporate Resolution) TOR mandates them to adjudicate complaints involving all information programs on CBC Radio, TV and the Internet. Restrictions: complaints involving entertainment programming are generally beyond the Ombudsman's mandate and should be addressed directly to the programs concerned.
CIDA Ombudsman	Mandate is to offer employees an informal, confidential problem-solving process.
Concordia University Ombudsman	Concordia University Ombudsman Office TOR, has scope over University-related concerns or complaints; Restrictions: collective agreements (s. 1)
Correctional Investigator	<i>Corrections and Conditional Release Act, R.S.C. 1992, c. 20 Part III.</i> Jurisdiction: offenders' problems re: decisions, recommendations, acts or omissions of the commissioner or those under his control/management; Restrictions: recommendations, decisions, acts or omissions of the National Parole Board, or decision emanating from a prov. correctional facility (s.167(1)(2))
DFAIT Ombudsman	Mandate is to listen and to facilitate resolution of complaints by DFAIT personnel in an informal fashion.
DIAND Ombudsman	Mandate is to help employees deal with all sorts of issues in the workplace, they can include unfair employment practices, conduct of other employees, and issues of ethical behaviour. It is an informal alternative to formal methods of resolving staff problems.
Israel Defence Force Soldiers' Complaint Commissioner	<i>The Military Law Part II: Examination of Soldiers' complaints, added to the Military Justice Law in the Book of Laws 664, August 1, 1972.</i> Jurisdiction: complaint by soldiers or dependants (s.4). "The Commissioner may investigate the complaint himself or appoint any other person to do so...may investigate the complaint in any manner he deems fit, and he is not bound to procedural law or to rules of evidence." (s.17); Restrictions: n/a.
Manitoba Ombudsman	<i>Ombudsman Act, R.S.M. 1987, c.O45.</i> Jurisdiction: Depts and agencies of the prov. Gov't; Restrictions: Courts, Legislature, Mbrs or Committees of the Exec Council, Arbitration Boards.
New Brunswick Ombudsman	<i>Ombudsman Act, R.S.N.B. 1997, c.O-5.</i> Jurisdiction over Prov. Agencies, Local gov'ts, school & hospital boards, Public corporate bodies; Restrictions: Exec council, courts, Privileged Info.
Norwegian Armed Forces Ombudsman	"Shall assist in safeguarding the civic rights of personnel in the Armed Forces and also by means of its activities endeavour to increase the efficiency of the Armed Forces." (s.1). Jurisdiction over matters such as mbrs economic and social rights; and matters concerning educational and welfare, work, messing, pensions, equipment, clothing and accommodation. (s.3). Restrictions: "No matter is too insignificant to be submitted to him".
Nova Scotia Ombudsman	<i>Ombudsman Act, R.S.N.S. 1970-71, c.3.</i> Jurisdiction over Prov. Depts and agencies, Local gov'ts; Restrictions on Exec council actions, Actions of judges, prosecutors or counsel for the Crown, or functions of law courts, Information certified by Attorney General to pertain to deliberations or activities of Exec Council.
Official Languages Commissioner	<i>Official Languages Act, R.S.C. 1985, c. O-31.</i> Jurisdiction over Institutions of the Parliament or Gov't of Canada including the House of Commons, the Senate and federal courts (s.2); Restrictions: n/a.
Ontario Ombudsman	<i>Ombudsman Act, R.S.O. 1990, c.O-6.</i> Jurisdiction over Prov. Gov't organizations; Restrictions on Exec Council (Cabinet), Crown Counsel, Judges and Courts.
Parliamentary Commissioner German Armed Forces	<i>Act in Respect of the Parliamentary Commissioner for the German Armed Forces (Act in Respect of Article 45b of the Basic Law, or Wehrbeauftragtergesetz)</i> last amended March 30, 1990 (BGBl. I p.599). Jurisdiction: soldiers' constitutional rights, responsible for monitoring adherence to the principles of <i>Innere Führung</i> (Part A, s.1).
<i>Protecteur du citoyen du Québec</i>	<i>Loi sur le Protecteur du citoyen, L.R.Q. 1995, chapitre P-32.</i> Jurisdiction over all "public body" whenever le Protecteur has reasonable cause to believe that a person or group of persons has suffered or may very likely suffer prejudice as a result of an act or an omission [...] (s.13); Restrictions: n/a.
RCMP External Review Committee	RCMP External Review Committee: <i>RCMP Act, R.S.C. 1985, R-10</i> , amended. Jurisdiction over RCMP grievances, appeals of formal discipline, appeals of discharge and demotion; Restrictions: if Commissioner chooses not to follow committee's recommendations, the reasons for not doing so must be included in the final decision.
Royal Netherlands Inspector General (Military)	Jurisdiction by Royal Decree on matters relating to Armed Forces and instituting investigations in matters relating to Armed Forces personnel or former personnel (s.2).
Saskatchewan Ombudsman	<i>The Ombudsman and Children's Advocate Act, R.S.S. 1978, c. O-4.</i> Jurisdiction over prov. Agencies (s.2(a)) and Public corporate bodies; Restrictions on Exec council actions (s.15) Privileged information, Crown Solicitors, Decisions of Courts, Judges.
Swedish Ombudsman	<i>The Parliamentary Ombudsman (JO – Justitieombudsmannen)</i> is mandated to supervise all central and local gov't agencies, their staff and persons who exercise public authority, including all judges and military officers; Restrictions: JO is not intended to supervise Cabinet ministers, members of the <i>Riksdag</i> or local gov't officials.
TD Bank – "Between Us" Program	Organizational ombuds function whose main aim is to ensure that every voice within TD Bank can be heard and that every problem can receive an impartial view. The Program exists to help surface and resolve in a fair and equitable manner problems that arise within the organization.
TD Bank – Ombudsman	Mandate is to address customer concerns in an attempt to maximize customer satisfaction.
US Department of Defense Inspector General	<i>Department of Defense – Inspector General Act of 1978</i> (amended). Jurisdiction: independent and objective office in the DoD, conducts, supervises, monitors, initiates audits and investigations relating to DoD ... to detect fraud and abuse (s.3), ... investigates, recommends corrective action ... violation of law, abuse of authority, danger to the public health and safety (s.5).

APPENDIX V – DND/CF OMBUDSMAN’S STAFF

<u>Name</u>	<u>Position</u>
André Marin	Ombudsman
Gareth Jones	Senior Policy Advisor
Barbara Finlay	Policy Advisor
Marc Pilon	Policy Advisor
Mimi Lepage	Policy Advisor
Barbara Theobalds	Director Communications and Media Liaison
Richard Inomata	Comptroller
Karen Blais	Administrative Assistant
Sue Babcock, Captain	Assistant Communications Officer
Claire Lemay, Warrant Officer	Administrative Clerk
Andrée Bénard	Receptionist/Secretary

APPENDIX VI – LIST OF ABBREVIATIONS AND ACRONYMS

ACCUO	Association of Canadian College and University Ombudsman
ADF	Australian Defence Force
ADM(Fin CS)	Assistant Deputy Minister (Finance and Corporate Services)
ADM(HR-Civ)	Assistant Deputy Minister (Human Resources – Civilian)
ADM(HR-Mil)	Assistant Deputy Minister (Human Resources – Military)
ADM(Mat)	Assistant Deputy Minister (Materiel)
ADM(Per)	Assistant Deputy Minister (Personnel)
ADM(Pol)	Assistant Deputy Minister (Policy)
ADR	Alternate Dispute Resolution
AFC	Armed Forces Council
AMS	Air Maintenance Squadron
APEC	Asian Pacific Economic Conference
ATI	Access to Information
BDE	Brigade
BIOA	British and Irish Ombudsman Association
Brig.-Gen.	Brigadier-General
CAD	Canadian Air Division
Capt.	Captain
CAS	Chief of the Air Staff
CBA	Canadian Bar Association
CBC	Canadian Broadcasting Corporation
CBG	Combat Brigade Group
CCRA	<i>Corrections and Conditional Release Act</i>
CCSFOR	Canadian Contingent Stabilization Force
CDS	Chief of the Defence Staff
CER	Combat Engineer Regiment
CF	Canadian Forces
CFAO	Canadian Forces Administrative Orders
CFB	Canadian Forces Base
CFGB	Canadian Forces Grievance Board
CFPARU	Canadian Forces Personnel Applied Research Unit
CFPM	Canadian Forces Provost Marshal
CFS	Canadian Forces Station (Leitrim)
CFSAL	Canadian Forces School of Administration and Logistics
CFSU (E)	Canadian Forces Support (Europe)
CFSU (O)	Canadian Forces Support Unit (Ottawa)
CHRC	Canadian Human Rights Commission
CHRT	Canadian Human Rights Tribunal
CIDA	Canadian International Development Agency
CLFCSC	Canadian Land Forces Command and Staff College
CLS	Chief of the Land Staff
CMBG	Canadian Mechanized Brigade Group

CMS	Chief of the Maritime Staff
CO	Commanding Officer
COIR	Commission of Inquiry Recommendations
Col.	Colonel
COY	Company
Cpl.	Corporal
CRA	Complaint Resolution Agency (Australia)
CRS	Chief of Review Services
CSC	Correctional Services Canada
DCDS	Deputy Chief of Defence Staff
DFAIT	Department of Foreign Affairs and International Trade
DFO	Defence Force Ombudsman (Australian)
DIAND	Department of Indian Affairs and Northern Development
DIN	Defence Information Network
DLSU	Departmental Legal Services Unit
DND	Department of National Defence
DND/CFLA	Dept of National Defence/Canadian Forces Legal Advisor
DoD IG	Department of Defense Inspector-General (United states)
DOJ	Department of Justice
DPCR	Director Personnel Complaints Resolution
DVA	Department of Veterans Affairs
FTE	Full Time Equivalent
GIC	Governor in Council
HMCS	Her Majesty's Canadian Ship
HOTEF	Helicopter Testing and Evaluation Facility
HT	Helicopter Training
IDF	Israeli Defence Force
IG	Inspector General
IOI	International Ombudsman Institute
JAG	Judge Advocate General
Jus	Justice Canada
LFAA	Land Forces Atlantic Area
LFCA	Land Forces Central Area
LFQA	Land Forces Quebec Area
LFWA	Land Forces Western Area
LFWATC	Land Forces Western Area Training Centre
Lieut.	Lieutenant
Lieut.-Gen.	Lieutenant-General
Lt.-Cmdr.	Lieutenant-Commander
Lt.-Col.	Lieutenant-Colonel
Lt.-Kol.	Lieutenant-Kolonel (German, Dutch)
MARLANT	Maritime Force Atlantic
MARPAC	Maritime Force Pacific
MBR	Member
MCCRT	Management, Command and Control Reengineering Team

<i>Me</i>	<i>Maitre</i>
MH	Maritime Helicopter
MIT	Massachusetts Institute of Technology
MND	Minister of National Defence
MP	Military Police
MPCC	Military Police Complaints Commission
NAEWF	NATO Airborne Early Warning Force
NATO	North Atlantic Treaty Organization
NCM	Non-Commissioned Member
NCO	Non-Commissioned Officer
NDHQ	National Defence Headquarters
NIS	National Investigation Services
NPF	Non-Public Funds
OL	Official Languages
OLC	Official Languages Commission
PM	Prime Minister
PPB	Personnel Policy Board
PPCLI	Princess Patricia's Light Infantry
PSC	Public Service Commission
<i>PSEA</i>	<i>Public Service Employment Act</i>
<i>PSSRA</i>	<i>Public Service Staff Relations Act</i>
PSSRB	Public Service Staff Relations Board
RA	Royal Artillery
<i>RALC</i>	<i>Régiment d'artillerie légère du Canada</i>
RCA	Royal Canadian Artillery
RCMP	Royal Canadian Mounted Police
RCR	Royal Canadian Regiment
Ret'd	Retired
RSC	Revised Statutes of Canada
SAMP	Security and Military Police
Sgt.	Sergeant
SHAPE	Supreme Headquarters Allied Powers Europe
SIU	Special Investigations Unit (Ontario)
TD	Toronto-Dominion (Bank)
TOA	The Ombudsman Association
TOR	Terms of Reference
UMCC	Union Management Consultation Committee
USOA	United States Ombudsman Association
VCDS	Vice Chief of the Defence Staff
WCB	Workers' Compensation Board
XO	Executive Officer

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